Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT,
PETITIONERS

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC. AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a respondent in a civil contempt proceeding, who has failed to obey a final order of the court directing him to comply with Internal Revenue Service summonses, may sustain his burden of establishing an inability to comply by submitting an uncross-examined statement that he does not have the summoned documents and asserting his Fifth Amendment privilege against self-incrimination.

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RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC. AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America and Joan M. Van Den Berg, a Special Agent of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-13a) is reported at 656 F.2d 1313. The opinion of the district court (App. B, *infra*, 14a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1981. On November 23, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

26 U.S.C. 7402(b) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

STATEMENT

In connection with an Internal Revenue Service (IRS) civil investigation of the tax liabilities of Richard W. Rylander, Sr. for the years 1973 through 1977, IRS summonses were issued to respondent, as president of Rylander & Co. Realtors, Inc. (Rylander & Co.), and as president of Affiliated Investments and Mortgage Company, dba AIM Real Estate Marketing and Counselling (AIM). The summonses, issued on January 4, 1979, sought testimony and production of corporate books and records (App. A, *infra*, 2a). When respondent failed to comply with the summonses, the United States and Joan M. Van Den Berg, Special Agent of the Internal Revenue Service, petitioned the United States District Court for the Eastern District of California for enforcement of the summonses, pursuant to 26 U.S.C. 7402(b) and 7604(a).

On November 19, 1979, the district court ordered respondent to appear before it to show cause why he should not be compelled to testify and to produce the requested records (App. A, *infra*, 2a). Despite directives from the court, respondent failed to file any response other than a letter to the Deputy United States Marshal, in which he claimed that he was not the president of the subject corporations and, therefore, had been improperly served (*ibid.*; App. B, *infra*, 15a). This same letter was attached to an unsworn declaration which respondent submitted to the court on January 9, 1980, wherein he stated that he was not the president of either corporation, was not the president at the time of issuance of the summonses, and was not associated with either corporation. He filed no other written response to the orders to show cause nor did he or any other corporate representative appear at the enforcement hearing (App. B, *infra*, 15a).

In view of respondent's letter, government counsel made an offer of proof at the enforcement hearing with regard to Rylander's relationship to the corporations and their status as viable entities (Tr. 4-14).[1] The offer of proof showed, *inter alia*, that Rylander & Co. was incorporated on April 1, 1969; that respondent opened a checking account at the Security Pacific Bank as president of Rylander & Co. and wrote checks on that account; that federal income tax returns for the company's 1972 and 1973 fiscal years were signed by respondent, as president of Rylander & Co.; that respondent signed a purchase agreement as president of Rylander & Co., purporting to sell all of its assets to AIM; and that the California Secretary of State's office had no record of dissolution of the corporation (Tr. 4-8).

An offer of proof was made as well with respect to AIM. It showed, *inter alia*, that AIM was incorporated on July 18, 1972, with respondent listed as one of three directors; that AIM's federal income tax returns for fiscal years 1972 and 1973 ~~tax years~~ were signed by respondent, as president; that respondent, as president, signed a fictitious name statement filed with the County of Sacramento; that respondent is the only authorized signatory for an account he opened for AIM with the Security Pacific Bank; that respondent was the president and agent of AIM for service of process; and that there was no record in the Secretary of State's office indicating dissolution of the corporation (Tr. 8-10). Agent Van Den Berg testified under oath that, if called, she would testify as to the truth of these matters with regard to both Rylander & Co. and AIM (Tr. 8, 10).

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[1] "Tr." refers to the transcript of proceedings in the district court.

On January 15, 1980, the court issued an order enforcing the summonses, requiring respondent to appear before the IRS agent and to produce for inspection and copying the records and documents of Rylander & Co. and AIM, as set forth in the summonses (App. E, *infra*, 26a-28a).[2] Respondent was personally served with the order on January 27, 1980 (App. B, *infra*, 16a). Although he met with Agent Van Den Berg on February 4, 1980, he failed to make any of the documents available to her for inspection (App. A, *infra*, 2a; App. B, *infra*, 16a). The government subsequently petitioned the district court for orders to show cause why respondent should not be held in contempt (App. A, *infra*, 3a; App. B, *infra*, 16a). Several show cause orders were issued, but numerous attempts by the United States Marshal to effect personal service on the respondent were unsuccessful (App. A, *infra*, 3a; App. B, *infra*, 16a). The court determined that constructive service, however, had been accomplished and that defendant was avoiding personal service (Tr. 20; App. B, *infra*, 16a). It therefore issued a bench warrant resulting in respondent's arrest on July 11, 1980 (App. A, *infra*, 3a; App. B, *infra*, 16a).

The show cause hearing was held on October 8, 1980 with respondent in attendance.[3] At the conclusion of the hearing, the district court found that respondent had failed to comply with a valid order and found him in civil contempt.[4] Respondent was remanded to the custody of the Attorney General "until such time as he purges himself of that contempt" (Tr. 262). The court indicated that respondent could purge himself by either (1) complying with the court's order of January 15, 1980, directing him to produce the summoned records or (2) by demonstrating his inability to produce them (Tr. 262-263).

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[2] Respondent took no appeal from the order enforcing the summonses (App. B, *infra*, 18a).

[3] Respondent was not represented by counsel at the hearing. He had twice previously dismissed appointed counsel, had refused to retain private counsel, and had clearly stated that he

Immediately after announcing its decision, the court—as it had on numerous occasions during the hearing—inquired whether respondent was willing to testify as to why he could not produce the summoned records and thereby purge himself of contempt (Tr. 263). When respondent indicated that he would testify (*ibid.*), government counsel informed the court that if respondent took the stand the government would seek to cross-examine him (Tr. 264). The court thereupon adjourned the purge hearing until the following day in order that an attorney could be appointed to represent respondent (Tr. 264-267).[5]

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wished to proceed without counsel (App. A, *infra,* 3a n.2). His participation in the hearing consisted largely of repeated demands that the district judge recuse himself and denials of the court's jurisdiction (see, *e.g.,* Tr. 54, 58-59, 104, 140, 266; see also App. B, *infra,* 14a).

[4] Respondent was also found to be in criminal contempt for failure to produce documents pursuant to the order of the district court enforcing the summonses and for failing to appear at a March 24, 1980, show cause hearing. An appeal of the criminal contempt conviction is pending before the Ninth Circuit (Nos. 80-1813, 80-1702 & 80-1703). This case was argued on June 9, 1981.

[5] This appointment of counsel was made at the suggestion of the court. Although respondent had twice previously dis-

Prior to the resumption of the hearing, respondent submitted a written statement entitled "Oath in Purgation of Contempt and Release of Records" (Tr. 273-275, 279-280). This declaration stated in part, "I swear on oath that I have no such records as called for in the Court's Order of January 16, 1980." When this statement was brought to the court's attention, it ordered the purge hearing continued until October 23, 1980, in order that appointed counsel could have additional time to prepare (App. A, *infra*, 4a; Tr. 280-287).

When the hearing reconvened respondent took the stand and verified that he had submitted a statement in which he stated he did not have the records (Tr. 323). He refused, however, to answer any questions as to the whereabouts of the summoned documents, asserting the Fifth Amendment privilege against self-incrimination (*ibid.*). At that point, the government moved to strike his statement on the ground that it was denied the opportunity to cross-examine with regard to its contents (Tr. 324).[6]

The following day, on October 24, 1980, the district court issued Findings of Fact and Conclusions of Law in which it found that respondent, as president or other officer of the subject corporations, had possession or control, or both, of the books and records of the corporations (App. B, *infra*, 17a). It further held that the burden of proof was on respondent to show why he could not comply with the court's

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missed appointed counsel, he now indicated that he would accept the services of counsel (App. C, *infra*, 21a-22a; Tr. 264, 273, 284-285, 294-295; see note 3, *supra*).

[6] The court denied the government's motion to strike respondent's affidavit (Tr. 323), but later decided it would take the motion under submission (Tr. 324; App. C, *infra*, 22a). It never specifically ruled on the motion thereafter.

order enforcing the summonses and that he had failed to introduce any evidence at the contempt trial to establish this inability (*id.* at 18a). Accordingly, the court found respondent in contempt for failing to comply with the enforcement order.

The court of appeals reversed. The court rejected the government's contention that respondent should be estopped in the contempt proceeding from litigating the issue of his ability to produce the records at the time the enforcement order was entered. Relying on the summary nature of enforcement proceedings and the absence of an express finding in the enforcement order that respondent had possession of the documents, the court ruled that respondent could raise nonpossession as a defense to contempt (App. A, *infra*, 6a-7a).

The court of appeals further held that respondent's written statement that the documents were not in his possession or under his control was sufficient to meet his burden of proving his inability to comply with the order to produce and, in view of his claim that any further testimony might incriminate him, he could interpose his claim of Fifth Amendment privilege as a bar to cross-examination as to the contents of his statement (App. A, *infra*, 10a). Finally, the court concluded that in these circumstances the government must bear the burden of proving that the documents in question actually do exist and are in respondent's possession or control (*id.* at 10a-11a).

Judge Norris concurred in a separate opinion. He found it unnecessary to adjudicate the consequences of respondent's assertion of the Fifth Amendment privilege; rather, he considered the oath in purgation sufficiently detailed to prove an inability to comply (App. A, *infra*, 12a-13a).

REASONS FOR GRANTING THE PETITION

In both this case and *United States* v. *Meeks*, 642 F.2d 733 (5th Cir. 1981), petition for cert. pending, No. 81-1063 (filed Dec. 7, 1981),[7] the courts of appeals concluded that a party who has failed to produce records pursuant to a court order enforcing a summons may carry his burden in subsequent contempt proceedings by simply denying possession of the records and then resting on his Fifth Amendment privilege against self-incrimination to defeat any further inquiry. These cases present important questions concerning the application of the Fifth Amendment privilege against self-incrimination in civil contempt proceedings. Although this case and *Meeks* differ from one another in certain factual details, both involve situations in which a corporate officer who is called upon to produce corporate books and records initially resists production on grounds other than an inability to comply. Following a final, appealable order compelling him to produce the summoned records, the respondent, when directed to show cause why he should not be held in contempt, asserts for the first time, in a written submission, that he cannot produce any records and that any further statement might incriminate him.

The decision below is in conflict with prior decisions of this Court and other courts of appeals on every issue raised: the estoppel effect of the enforcement order, the burden of proof in contempt proceedings, and waiver of the Fifth Amendment privilege. If permitted to stand, the decision below would deal a crippling blow to the IRS's ability in the face of dilatory and obstructionist tactics, to obtain information essential to determining tax liabilities and to the ability of district courts, in any context, to compel compliance with valid orders by imposing contempt sanctions.

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[7] The rationale of the Fifth Circuit in *Meeks* is slightly different from that employed by the court of appeals in this case. The differences in the two cases make it appropriate for this Court to grant both petitions so that all the ramifications of the important questions presented may be fully explored.

1. An individual ordered to respond to a summons or subpoena to produce books and records must either produce the requested documents or present defenses justifying his failure to do so. *McPhaul* v. *United States*, 364 U.S. 372, 379 (1960); *United States* v. *Bryan*, 339 U.S. 323, 330-331 (1950); *United States* v. *Fleischman*, 339 U.S. 349, 363 (1950). In the context of an IRS summons, those defenses must be asserted at an enforcement proceeding which, although ordinarily summary in nature,[8] has all the elements of an adversary hearing, affording a summoned party a judicial determination of any challenges he wishes to make to the summons. *Reisman* v. *Caplin*, 375 U.S. 440 (1964); *United States* v. *Euge*, 444 U.S. 707, 719 (1980). By raising and proving the nonexistence or lack of control of the records, he makes an absolute defense to the summons.[9] *United States* v. *Bryan*, *supra*, 339 U.S. at

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[8] See *United States* v. *Powell*, 379 U.S. 48 (1964), which sets forth the conditions the government must meet in an enforcement proceeding. Those conditions were satisfied in this case, as the district court found. See App. B, *infra*, 19a.

[9] This Court has recognized that a rule requiring defenses to be raised on a timely basis has the salutary effect of allowing any defects in the process to be remedied at an appropriate stage. *United States* v. *Bryan*, *supra*, 339 U.S. at 332-333; *United States* v. *Fleischman*, *supra*, 339 U.S. at 352. The practical benefits of this rule are evident in this case. Al-

330-331; *United States* v. *Asay*, 614 F.2d 655, 660 (9th Cir. 1980). With the failure or absence of such proof, the entry of an order enforcing the summons becomes a final, appealable order. *Reisman* v. *Caplin*, *supra*. The witness is thereafter barred by *res judicata* from litigating the issue of his possession and control of the summoned records at the time of the order. *Maggio* v. *Zeitz*, 333 U.S. 56, 75-76 (1948); *United States* v. *Peter*, 479 F.2d 147 (6th Cir. 1973); *United States* v. *Secor*, 476 F.2d 766 (2d Cir. 1973).

The opinion of the court of appeals is thus in conflict with the decision of this Court in *Maggio* v. *Zeitz*, *supra*, and with the decisions of the Second and Sixth Circuits in *United States* v. *Secor*, *supra*, and *United States* v. *Peter*, *supra*. The court here determined that inasmuch as respondent did not appear and "actually litigate" (App. A, *infra*, 7a & n.6) any defenses at the enforcement stage—despite notice and a hearing—he is not foreclosed at the contempt hearing from raising defenses which were available to him earlier. In so holding, the court concluded that the enforcement proceeding did not result in a finding that respondent had the ability to comply with the summons (App. A, *infra*, 6a-7a). This holding ignores the order of the district court enforcing the summons. Although that order did not expressly rule on respondent's ability to comply—an issue which had

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though respondent did not appear at the enforcement hearing, the government responded with a detailed offer of proof to the only defense respondent had suggested—*i.e.*, his specious contention that he was not an officer of Rylander & Co. and AIM. The government can not nor should it be required to divine all unasserted defenses and respond to each of them. That, however, is the inevitable result of the opinion below.

not been presented—implicit in an enforcement order is a determination that respondent did, in fact, have the records sought. See *Clinkenbeard* v. *Central Southwest Oil Corp.*, 526 F.2d 649, 651 (5th Cir. 1976). Moreover, the district court's Findings of Fact and Conclusions of Law, entered after the contempt hearing, explicitly found that respondent had possession or control of the records at all relevant times (App. B, *infra*, 17a).

The court of appeals erred also in discounting the presumption that respondent, as president of the subject corporations, had possession or control of the corporate records or could furnish some reasonable explanation as to his inability to produce them. *Lopiparo* v. *United States*, 216 F.2d 87, 91 (8th Cir. 1954), cert. denied, 348 U.S. 916 (1955). Respondent's belated written statement that he could not produce the records was subject to appraisal by the district court, which had the duty to assess respondent's credibility and to determine the weight to be given to his statement. *Nilva* v. *United States*, 352 U.S. 385, 395 (1957); *Lopiparo* v. *United States*, *supra*, 216 F.2d at 91. There was no basis here for the panel to give that uncross-examined, self-serving statement a degree of credibility found unwarranted by the district court, and concomitantly to ignore the presumption that a corporate officer has a continuing ability to produce books and records.

2. Evidence introduced at a show cause hearing demonstrating that an alleged contemnor has failed to comply with a court order establishes a prima facie case of contempt. The burden then shifts to the alleged contemnor to go forward and to demonstrate by clear and convincing proof why he should not be held in contempt. *McPhaul* v. *United States*, *supra*,

364 U.S. at 379; *Nilva* v. *United States, supra,* 352 U.S. at 392; *United States* v. *Bryan, supra,* 339 U.S. at 330-331; *United States* v. *Fleischman, supra,* 339 U.S. at 363; *Oriel* v. *Russell,* 278 U.S. 358, 366 (1929); *United States* v. *Hankins,* 565 F.2d 1344, 1351-1352 (5th Cir. 1978), opinion clarified and rehearing denied, 581 F.2d 431, cert. denied, 440 U.S. 909 (1979); *Sigety* v. *Abrams,* 632 F.2d 969, 974 (2d Cir. 1980); *United States* v. *Hansen Niederhauser Co.,* 522 F.2d 1037, 1040 (10th Cir. 1975).

The court of appeals carved out an exception to the established rule regarding the burden of proof in contempt cases, solely as a result of the respondent's invocation of the Fifth Amendment privilege. It thus transformed a self-serving statement, which has not been subject to cross-examination, into "evidence" deemed sufficient to sustain the otherwise substantial burden of establishing one's inability to comply with a court order. The only stated justification for this departure from settled decisional law was respondent's assertion of a Fifth Amendment privilege. Contrary to the court of appeals' conclusion, the prior decisions of this Court and other courts of appeals provide no basis for holding that a naked claim of privilege can shift the burden of proof. Indeed, in *McPhaul* v. *United States, supra,* a case in which the sole justification for refusing to present any evidence was a claim of Fifth Amendment privilege, this Court held that a witness's refusal to present evidence properly supported findings that he did not carry his burden and that he raised no issue regarding the existence of the subpoenaed records or his ability to produce them. Also in conflict with the decision here is *United States* v. *Hankins, supra,* a case in which the Fifth Circuit affirmed a civil contempt order, holding that Hankins had not met his burden of showing that he did not possess the summoned documents, and that the Fifth Amendment did not excuse him from having to meet this burden by the introduction of credible evidence including, if necessary, his own testimony. 565 F.2d at 1351. Similarly, in *United States* v. *Johnson*, 247 F.2d 5 (2d Cir. 1957), and *Lopiparo* v. *United States*, *supra*, the courts held that witnesses could not meet their burdens simply by denials of possession coupled with assertions of Fifth Amendment privilege. See also *Sigety* v. *Abrams*, *supra*.

Thus, despite an assertion of the Fifth Amendment privilege, it is neither impermissible nor unfair to place the burden on the respondent to prove his inability to comply. Contrary to the panel's suggestion, the government does not contend that respondent must testify in order to meet his burden. He was not, after all, held in contempt for refusing to testify, but for failing to comply with the enforcement order. Accordingly, he had the choice of producing the documents, adducing evidence of his inability to comply, or being incarcerated for contempt. The manner in which he elected to proceed rested with him. Merely because a choice is difficult does not preclude requiring an individual to choose, as this Court recognized in *McGautha* v. *California*, 402 U.S. 183, 213 (1971).

In nullifying respondent's burden, the court of appeals incorrectly placed on the government the burden of making an affirmative showing at the contempt hearing that respondent had possession or control of the corporate records. This imposes an obligation on the government which is in conflict with the standards set forth in *United States* v. *Bryan*, *supra*, and *United States* v. *Fleischman*, *supra*, cases in which this Court recognized that any reasons for not fully complying are peculiarly within the knowledge of the alleged contemnor.[10] Thus, this Court observed that the government would be saddled with a serious practical handicap if it must prove a negative, *i.e.*, that respondent had no good reason for failing to comply. *United States* v. *Fleischman, supra,* 339 U.S. at 362-363.[11]

3. By accepting respondent's written, uncross-examined statement, introduced at the contempt proceedings, as credible evidence establishing his inability to comply, the court of appeals has created a rule of evidence which is in conflict with decisions of this Court and other courts of appeals. This Court has held that a person claiming an inability to comply cannot meet his burden of proof if he offers no evidence; nor can he do so by his own denials which the court finds incredible in context. *Maggio* v. *Zeitz, supra,* 333 U.S. at 75-76; see *Lopiparo* v. *United States, supra,* 216 F.2d at 92. It is well-established that

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[10] The court compounded this error by concluding that the government could not meet its burden by relying on the evidence most likely available to prove facts within the respondent's knowledge—*i.e.*, "inferences that the records sought are of a type ordinarily kept by corporations, and that a person in the [respondent's] position would ordinarily have control over such records." App. A, *infra,* 10a.

[11] The court of appeals' error is clearly demonstrated by the facts of this case. Although the government was not required to do so, it attempted at the contempt hearing to adduce evidence of respondent's ability to comply. The government called as witnesses two corporate officers of Rylander & Co. and AIM, with the following results: one witness, respondent's son, asserted his Fifth Amendment privilege to all but rudimentary questions; the other stated that he was not in fact an officer of the corporations; and there was evidence that both witnesses had been ordered by respondent not to comply with production orders (Tr. 167, 235-236; Gov't Exh. 32).

self-serving statements made in an ex parte declaration are not considered credible evidence in the absence of an opportunity for cross-examination as to matters which the declaration puts into issue. *Walker* v. *Johnson*, 312 U.S. 275, 281 (1941); *United States* v. *Hankins, supra; Lindhorst* v. *United States*, 585 F.2d 361, 365 (8th Cir. 1978); *Presser* v. *United States*, 284 F.2d 233 (D.C. Cir. 1960), cert. denied, 365 U.S. 816 (1961).

If, on the other hand, the court of appeals correctly decided that Rylander's written submission was competent evidence, then it should also have found that Rylander waived his privilege against self-incrimination. A witness who takes the stand in his own behalf cannot refuse to be cross-examined; his voluntary offer of testimony upon any fact operates as a waiver of the Fifth Amendment privilege as to matters reasonably related to the subject matter of the direct examination. *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *Brown* v. *United States*, 356 U.S. 148, 154-156 (1958); *Johnson* v. *United States*, 318 U.S. 189, 195 (1943); *United States* v. *Beechum*, 582 F.2d 898, 907-910 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Hearst*, 563 F.2d 1331, 1340 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). Moreover, a refusal to be cross-examined subjects the testimony given on direct to being stricken as incompetent. *Brown* v. *United States, supra*, 356 U.S. at 154-156.

The holding of the court of appeals that respondent's affidavit, albeit uncross-examined, was competent evidence which satisfied his burden of proving an inability to produce the records is at odds with basic evidentiary principles and is squarely in conflict with the decision in *United States* v. *Hankins, supra*. In that case, the Fifth Circuit held that if no opportunity for cross-examination were afforded, a statement by the contemnor that he could not comply with a summons was not credible evidence. There, as here, the summoned party did not assert lack of possession or the nonexistence of records as a defense in the summons enforcement proceeding. The assertion that the records could not be produced was raised only when Hankins was called upon to show cause why he should not be held in contempt for refusing to comply with an order enforcing a summons. He then offered to testify but only under the condition that he not be cross-examined. The district court rejected this proposal and found him in contempt. The Fifth Circuit affirmed, holding that Hankins had not met his burden of showing that he did not possess the summoned documents, and that the Fifth Amendment did not excuse him from the possibility of having to testify in order to meet his burden of proof.

Thus, while no one may be forced to give self-incriminating testimony, an individual who elects to testify may not give evidence on his own behalf and thereafter resist cross-examination on matters which he has put in issue. To allow this is to offer a witness a "positive invitation to mutilate the truth." *United States* v. *Beechum*, *supra*, 582 F.2d at 908.

4. The decision below will greatly hamper the IRS's ability to obtain information it needs to ascertain tax liabilities. As this Court has noted, a summons is not "an invitation to a game of hare and hounds." *United States* v. *Bryan*, *supra*, 339 U.S. at 331. Yet, it is just such gamesmanship that the decision below vindicates. Unless reversed, the decision would permit recipients of IRS summonses to toy with the government for years, claiming specious defenses to production of records, and to do so with impunity. Witnesses would be able to play this game

of "hare and hounds," secure in the knowledge that at the end of the day a simple denial of possession and assertion of the Fifth Amendment privilege will provide immunity from contempt while depriving the IRS of information it has a right to obtain. Under the decision below, this game can continue while the statutes of limitations are running.[12] Due to the great practical importance of the court's ruling, this Court should correct the erroneous refusal of the court of appeals to hold the respondent to the proper rules of estoppel, waiver and burden of proof.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consolidate this case with *United States* v. *Meeks*. No. 81-1063, or to hear the cases in tandem.

Respectfully submitted.

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DECEMBER 1981

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[12] See 26 U.S.C. 6501 (a), (c) and 6531.

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 80-4594, 80-4595

DC Nos. S-79-570, S-79-571

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD W. (DICK) RYLANDER, SR.,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Submitted: February 17, 1981

Filed Sept. 4, 1981

Before: WALLACE, FLETCHER and NORRIS, Circuit Judges

OPINION

FLETCHER, Circuit Judge:

This is an appeal from an order holding Rylander in civil contempt for failure to comply with an IRS summons. The court below ordered Rylander incarcerated until he produces the records described in the summons or testifies as to why he cannot do so. Rylander appeals pursuant to 28 U.S.C. § 1826(b) and 1291. We hold that the government has not met its burden of providing that Rylander has the specified records, and we reverse and remand.

I

FACTS

These contempt proceedings arose out of an IRS attempt to investigate the tax liability of two corporations, Rylander and Company Realtors, Inc., and Affiliated Investments and Mortgage Company. The IRS issued a summons to Richard W. Rylander, Sr., as president of the corporations, ordering him to testify and to produce certain records of the corporations. The IRS petitioned the district court for judicial enforcement of the summons, I.R.C. §§ 7602, 7604(b), and on November 19, 1979 the district court issued an order to show cause why the summons should not be enforced.

A show cause hearing was scheduled for January 14, 1980, and Rylander was duly served with notice. Rylander did not appear at the hearing, nor did he file pleadings in response to the show cause order. Instead, he returned the order to the court, together with a letter claiming that he was not the president of the subject corporations and had thus been improperly served. The court nevertheless proceeded with the show cause hearing on January 14. Following an offer of proof and testimony by IRS agents, the court concluded that Rylander was president of the corporations. The court then enforced the summons, ordering Rylander to appear before an IRS agent on February 4, 1980 and produce the records requested by the IRS.

Rylander appeared on February 4, but brought no records with him. He stated that he did not have any of the records called for by the summons, and that he had therefore complied with the summons as far as he was able. He then refused to answer any further questions.

The IRS petitioned for enforcement of the court's order, and the court issued an order to show cause why Rylander should not be held in contempt. Attempts to serve Rylander with this order and several subsequent orders to show cause were unsuccessful. Finally, on May 27, 1980, the court determined that Rylander was avoiding service and issued a bench warrant for his arrest.[1]

On October 8, 1980, the court held a show cause hearing to determine whether Rylander should be held in contempt for failure to obey the order enforcing the summons.[2] The court concluded that, while inability to comply with the summons would constitute a defense to the contempt charges, Rylander had the burden of showing that he was unable to comply and had failed to meet his burden. The court found Rylander guilty of civil contempt, and ordered him

> remanded to the custody of the Attorney General unless and until he purges himself of the civil contempt charge by either: (1) Complying with

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[1] Rylander was charged with criminal contempt for avoiding service, for failing to comply with an earlier order to produce, and for failing to appear at a show cause hearing. The latter two charges resulted in convictions, which are the subject of a separate appeal.

[2] Rylander was not represented by counsel at this hearing. We find no merit to Rylander's claim that his right to counsel was violated, however. We note that Rylander dismissed his appointed counsel on two occasions, refused to retain private counsel, and, when informed of his rights, unequivocally informed the court that he wished to proceed without counsel. We also find that Rylander had no right to a jury trial, that the court's decision to combine the civil and criminal contempt proceedings was proper, and that the trial judge did not err in refusing to disqualify himself.

> the Court Order to produce the documents; or (2) Testifies [*sic*] why he cannot produce the documents.

At this point, Rylander stated that he wished to purge himself of the contempt by testifying as to why he could not produce the documents. The government responded that it intended to cross-examine Rylander on his testimony. The court then continued the proceedings until the following day so that counsel could be appointed to represent Rylander. The next morning Rylander submitted a sworn "Oath in Purgation of Contempt" stating that he did not have any of the records called for by the IRS summons. Recognizing that Rylander's fifth amendment rights might be involved, the court vacated its contempt order and continued the proceedings until October 23, 1980 to give counsel an opportunity for further briefing.

On October 23, Rylander took the stand and testified that he did not have the records. When asked where the records were, he declined to answer on fifth amendment grounds. The court then reinstated its order of October 8, holding Rylander in contempt and setting the same purging conditions. Incarceration was suspended pending this appeal.[3]

II

DISCUSSION

The purpose of a civil contempt sanction is to compel compliance with a court's order. *United States* v. *Powers*, 629 F.2d 619, 627 (9th Cir. 1980); *United*

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[3] Under 28 U.S.C. § 1826, Rylander could be confined for the life of the court proceeding or eighteen months, whichever is shorter. *United States* v. *Powers*, 629 F.2d 619, 626 (9th Cir. 1980).

States v. *Asay*, 614 F.2d 655, 659 (9th Cir. 1980). If compliance is impossible, a contempt sanction can serve no purpose. For this reason, inability to comply is generally recognized as a defense to a charge of civil contempt. *Asay*, 614 F.2d at 660; *see United States* v. *Hankins*, 565 F.2d 1344, 1351-52 (5th Cir. 1978); *United States* v. *Rizzo*, 539 F.2d 458, 465-66 (5th Cir. 1976).[4] In this case, the trial court's contempt order was designed to compel Rylander to produce the documents covered by the IRS summons. Rylander has claimed that he is unable to comply, but has put forth no evidence other than his own sworn statement in support of his claim. In order to determine whether Rylander was properly held in contempt, we must therefore decide two questions: First, who has the burden of proving Rylander's ability or inability to comply with the summons? And second, has that burden of proof been met? Our analysis is, of course, colored by our recognition that Rylander has asserted what appears to be a bona fide fifth amendment claim.[5]

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[4] In *Asay* we distinguished between "compulsory" civil contempt sanctions, designed to compel the respondent to comply with a court order, and "compensatory" civil contempt sanctions, *i.e.*, fines, designed to compensate the government for costs incurred as a result of the respondent's failure to comply with a court order. We held that self-induced inability to comply is not a defense to the imposition of a "compensatory" contempt sanction. 614 F.2d at 660. Since the proceedings here are clearly compulsory in nature, inability to comply is a complete defense. *Id.*

[5] Since the documents belong to the corporations and not to Rylander personally, Rylander could not refuse to produce the documents on the ground that their contents might serve to incriminate him. *E.g., Curcio* v. *United States*, 354 U.S. 118, 122 (1957). However, Rylander's claim is that answering

A. *Res Judicata.*

As a preliminary matter, we must consider the government's contention that at the time of the contempt hearing, Rylander was foreclosed from asserting that he did not have the documents. In the government's view, Rylander could have asserted this defense during the summons enforcement proceeding. Because he failed to do so, the government argues that the enforcement order is *res judicata* on the issue of whether Rylander actually had the documents. We disagree. As the government itself points out, enforcement proceedings under I.R.C. § 7604(b) are summary in nature. When the IRS seeks to enforce a summons, its burden is very light; it need only show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the [Internal Revenue] Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). The IRS need not show that the information sought is in the possession of the person summoned. *United States* v. *Freedom Church*, 613 F.2d 316, 322 (1st Cir. 1979).

In the present case, the enforcement proceeding did not result in a finding that Rylander had possession of the documents. The court limited its inquiry to the issues of whether Rylander was the president of the corporations being investigated, and whether the

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questions as to the documents' whereabouts might serve to incriminate him. A custodian of records cannot, consistent with the fifth amendment, be forced to answer such questions. *Id.* at 128; *United States* v. *O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979).

Powell conditions had been met. As noted above, Rylander did not appear and did not raise any defenses. Since a finding on Rylander's ability to comply with the summons was unnecessary at the enforcement stage, and since no such finding was made, we hold that Rylander was not foreclosed from claiming during the contempt proceedings that he was unable to comply with the summons.[6]

B. *Burden of Proof.*

In a civil contempt proceeding, the proof of contempt must be clear and convincing. *United States* v. *Powers*, 629 F.2d 619, 626 n.6 (9th Cir. 1980); *United States* v. *Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976). To make a prima facie showing of contempt, however, the government need prove only that the defendant has failed to comply with a valid court order. It need not prove that the defendant is able to comply. As we stated in *NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973) (citations omitted),

> although inability to comply with a judicial decree constitutes a defense to a charge of civil contempt, the federal rule is that one petitioning for an adjudication of civil contempt does not have the burden of showing that the respondent

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[6] If the issue of Rylander's ability to comply with the summons had been actually litigated during the enforcement proceedings, we might reach a different result. *See Maggio* v. *Zeitz*, 333 U.S. 56, 68-69 (1948); *United States* v. *Asay*, 614 F.2d 655, 659 (9th Cir. 1980). At the very least, we would expect that during the contempt proceeding the court would take judicial notice of any findings made at the enforcement stage. *See United States* v. *Hankins*, 565 F.2d 1344, 1351 & n.3 (5th Cir. 1978).

> has the capacity to comply. The contrary burden is upon the respondent. To satisfy this burden the respondent must show "categorically and in detail" why he is unable to comply.

We view *Trans Ocean* as imposing on the defendant a burden of production. This burden is normally satisfied when the defendant produces sufficient evidence of his inability to comply to raise a question of fact. *Texas Department of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214, 4216 & n.8 (March 4, 1981); *see United States* v. *King*, 587 F.2d 956, 964-65 (9th Cir. 1978). The burden of persuasion remains on the government, but what may be required to sustain the burden varies according to the evidence produced by the defendant. Initially, the government need persuade the court only that the defendant has failed to comply with a valid court order. Once the defendant has produced detailed evidence regarding his inability to comply with the order,[7] the government has the additional burden of persuading the court that the defendant actually is able to comply. *Cf. United States* v. *Hearst*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978) (in criminal case, government has burden of disproving only those defenses which are actually raised).

Rylander asserts that he cannot "show 'categorically and in detail' why he is unable to comply" without incriminating himself. He argues that application of the *Trans Ocean* rule to his case would therefore violate his fifth amendment rights. No fifth amendment claim was involved in *Trans Ocean*, so the court had no opportunity to consider whether the rule it announced could constitutionally be applied in cases such as this one.[8] We now conclude that it cannot, and that if Rylander's fifth amendment claim is valid, his rights would be violated if he were required to produce categorical and detailed evidence demonstrating his inability to comply with the court's order enforcing the summons.

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[7] The type of evidence needed to satisfy the defendant's burden of production will, of course, vary from case to case. We need not decide what evidence will satisfy the defendant's burden when no fifth amendment claim is raised.

The government suggests that Rylander might be able to show his inability to comply by adducing unprivileged testimony from third persons. This suggestion is merely speculative, however. If there are no third persons who could testify as to the whereabouts of the documents, Rylander would be forced to submit to incarceration or run the risk of incriminating himself. It is exactly this dilemma which the fifth amendment is designed to protect against. *See Curcio* v. *United States*, 354 U.S. 118, 123-24, 128 (1957).

We do not mean to suggest that a defendant in Rylander's position can simply stand mute and force the government to come forward with proof that the defendant is able to comply with the court's order. It is clear that when the defendant gives no indication that he cannot comply, the government need prove only his noncompliance. *McPhaul* v. *United States*, 364 U.S. 372, 378-79 (1960); *Trans Ocean*, 473 F.2d at 615-16; *United States* v. *Hankins*, 565 F.2d 1344, 1351-52 (5th Cir. 1978). We therefore hold that when a court order requires the production of documents, the defendant must either produce the documents or state under oath that they are not in his possession or under his control. *United States* v. *O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979). Although the defendant would ordinarily have the burden of producing detailed evidence regarding his inability to comply, *Trans Ocean*, 473 F.2d at 616, he cannot be forced to produce such evidence if he properly claims that his testimony as to the whereabouts of the documents might be incriminatory. *Curcio*, 354 U.S. at 123-25; *O'Henry's Film Works*, 598 F.2d at 318.

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[8] In *Trans Ocean* the respondents did not claim that they could not comply with the court's order. Instead, they argued (1) that the petition for an adjudication of contempt was defective in that it failed to allege that respondents could comply with the order, 473 F.2d at 615, and (2) that the government failed to prove beyond a reasonable doubt that respondents could comply, *id.* at 616. The court held that such allegations and proof were unnecessary. *Id.* at 615-16.

When the defendant has made a bona fide fifth amendment claim, his statement that the documents are not in his possession or under his control is sufficient to satisfy his burden of production. The burden then shifts to the government to produce evidence showing that the documents in question actually exist and are in the defendant's possession or under his control. *United States* v. *Hansen Niederhauser Co.*, 522 F.2d 1037, 1040 (10th Cir. 1975); *see United States* v. *Fleischman*, 399 U.S. 349, 353-55 (1950). Although relevant, inferences that the records sought are of a type ordinarily kept by corporations, and that a person in the defendant's position would ordinarily have control over such records are not adequate to meet the government's burden of proof.

Applying the standard we have articulated above, we hold that if Rylander's fifth amendment claim is valid, his statement that the documents were not in his possession or under his control was sufficient to meet his burden of production. We must remand for the district court to make a finding concerning the validity of Rylander's fifth amendment claim. *Davis* v. *Fendler*, 650 F.2d 1154, 1159-60 (9th Cir. 1981); *United States* v. *Neff*, 615 F.2d 1235, 1239 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980). If the court finds that Rylander's fifth amendment claim is valid, the government will have an opportunity to show that the summoned records are in Rylander's possession or under his control. The court should permit the government to introduce additional evidence in order to meet its burden. At this stage of the proceedings, however, we must conclude that the government has not met its burden of showing by clear and convincing evidence that Rylander is in contempt. The order of the court below must therefore be reversed.

REVERSED AND REMANDED.

NORRIS, Circuit Judge, concurring,

I believe the majority decides, unnecessarily, a novel Fifth Amendment question, yet fails to address squarely a nonconstitutional issue that I believe is dispositive of this appeal.

I agree with the majority that the defendant carries the initial burden of production on the issue of his inability to comply with a summons to produce documents, which, as the majority notes, is a defense to a charge of civil contempt. I also agree that once this initial burden is met, the government has the ultimate burden of persuading the court that the defendant is able to comply.

Where I have difficulty with the majority is its failure to analyze whether Rylander's sworn statements were sufficient to meet his burden of production. The majority gives Rylander credit for nothing more than a general denial that he had any of the records called for by the summons, when in fact his response was much more detailed. In his oath of purgation, Rylander stated:

> I know not the location of any such records, if any there be, or that any such records, if any there be, are in any way under my control or supervision or that I have in any way placed such records, if any there be, in the hands of other persons to hold for me. I further swear an oath that I have no intent, plan or purpose to withhold any such records, if any there be, from the Court. . . .

In my view, such a detailed statement denying under oath knowledge of the location of any such records or that any such records are in his possession or control should be sufficient to put into issue defendant's "inability to comply" defense, shifting the burden of going forward back to the government. To require him to produce more evidence runs a serious risk of threatening a person with imprisonment for failure to do what may be difficult if not impossible for him to do, *i.e.*, adduce evidence, beyond his own denials, to prove a negative—the nonexistence of the subpoenaed records of his lack of possession or control of such records. *Cf. Battaglia* v. *United States*, No. 81-5339 (9th Cir. Aug. 1981) (in a contempt proceeding for failure to answer questions before a grand jury, defendant's testimony that he did not remember the events in question is sufficient to meet his burden of production on the issue of inability to comply).

Like the majority, I agree that the case should be remanded to give the government an opportunity to carry its burden of persuasion that Rylander has the ability to produce the records. To be sure, in attempting to carry that burden the government may question Rylander concerning the existence of the records and any knowledge he may have of their whereabouts.[1] Rylander may again decline to answer the questions on Fifth Amendment grounds, leaving it to the trial judge to determine whether his assertion of the privilege is bona fide. But there is no need to decide now what the majority seems to hold, *i.e.*, that a defendant who fails to satisfy his burden of production on his inability to comply, may effectively carry that burden by claiming the Fifth Amendment privilege.

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[1] The testimony of third parties concerning the whereabouts of the records as well as evidence "that the records sought are of a type ordinarily kept by corporations, and that a person in the defendant's position would ordinarily have control over such records" would of course also be relevant to the question of defendant's ability to comply.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Criminal No. S-80-44-LK

Associated Cases:
S-79-570-LKK
S-79-571-LKK

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICHARD W. (DICK) RYLANDER, SR., DEFENDANT

Filed Oct. 24, 1980

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE CIVIL CONTEMPT

This cause came on for court trial on October 8, 1980, pursuant to a petition by the United States Attorney for an order to show cause why defendant should not be held in contempt and the order to show cause. This Court has heard the testimony and examined the proofs offered by the plaintiff United States. Defendant neither filed an Answer to the petition, nor offered any evidence at trial, but entered *in propria persona*, a continuing objection to the proceedings on various grounds, including lack of jurisdiction. This Court, having rendered on October 8, 1980 a decision in favor of the plaintiff, hereby adopts its Findings of Fact and Conclusions of Law as follows:

IT IS TRUE THAT:

1. Upon the petition of the United States and the exhibits attached thereto, this Court on November 20, 1979 ordered Rylander & Company Realtors, Inc., Affiliated Investments & Mortgage Company, dba AIM Real Estate Marketing and Counseling and Richard W. (Dick) Rylander, Sr. (hereafter Defendant), as president of subject corporations, to show cause why they should not be compelled to testify and to produce the records demanded in the Internal Revenue Service summonses served upon them on January 4, 1979 by Joan M. Van Den Berg, IRS Special Agent. *United States of America, Joan M. Van Den Berg, Special Agent,* v. *Rylander & Co., Realtors, Inc., and Richard W. Rylander, Sr., President, Rylander & Co. Realtors, Inc.,* Civil No. S-79-570, and *United States of America, Joan M. Van Den Berg, Special Agent,* v. *Affiliated Investments & Mortgage Company, et al.,* Civil No. S-79-571. Hearing on these Orders to Show Cause was set for 10:00 a.m. on January 14, 1980.

2. Defendant was personally served with the petitions and Orders to Show Cause on November 30, 1979.

3. Defendant returned the Orders to Show Cause and supporting pleadings to the U.S. Marshal with a letter addressed to the deputy marshal and a copy to the Clerk of the District Court, claiming that Defendant was not the president of the subject corporations and therefore had been improperly served. Defendant filed no other written response to the Orders to Show Cause nor did he or other corporate representatives appear at the scheduled January 14 hearing. Following an offer of proof by the petitioner,

oral testimony and argument, this Court issued written Orders Enforcing the Summonses on January 15, 1980. The Orders required the Defendant to appear on Monday, February 4, 1980 at 10:00 a.m., before Joan Van Den Berg, or other person designated by the United States, at the IRS office in Sacramento, California, and produce the records and documents (with certain exceptions not here pertinent) of Rylander & Co. Realtors, Inc. and Affiliated Investments & Mortgage Co., as requested by the IRS summonses.

4. Defendant was personally served with the Orders Enforcing Summonses on January 27, 1980. No appeal was taken from said Orders by Defendant, a person knowledgeable in taking and perfecting appeals from judicial orders enforcing IRS summonses.

5. Defendant appeared at the IRS office in Sacramento on February 4, 1980; did not produce any corporate books or records; claimed he did not possess them; and declined to answer any questions regarding the records' whereabouts.

6. On ensuing petitions by the United States to enforce this Court's Order of January 15, 1980, this Court issued Orders to Show Cause why defendant should not be held in contempt on February 11, 1980; February 25, 1980; March 28, 1980 and April 23, 1980. Efforts by the U.S. Marshal to serve these personally on Defendant were unsuccessful. Repeated service by mail and by publication failed to elicit any appearance by Defendant at Order to Show Cause hearings on March 10, 1980; March 24, 1980; April 15, 1980 and May 27, 1980. A bench warrant issued by this Court on May 27, 1980 resulted in Defendant's arrest on July 11, 1980. He has been free on bail since July 14, 1980.

7. At all times pertinent here, subject entities, Rylander and Co. Realtors, Inc. and Affiliated Investment and Mortgage, were corporations duly incorporated under the laws of the State of California. [Defendant, as president or other corporate officer, had possession or control, or both, of the books and records of said corporations.]

8. The corporate books and records which are the subject of this Court's Order of January 15, 1980 remain relevant to the IRS investigation into the tax liability of Defendant. This investigation is still under way. The IRS does not presently possess said corporate books and records.

From the foregoing facts, this Court concludes:

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the subject contempt proceeding and the parties. This Court has inherent civil contempt power. *United States* v. *Asay,* 614 F.2d 655, 659 (9th Cir. 1980); 28 USC § 1651(a); Rule 70 of the Federal Rules of Civil Procedure. In addition, where a person refuses to comply with a Court's Order enforcing an IRS Summons, this Court is specifically authorized to secure compliance with its orders by adjudicating the person in civil contempt. (26 USC § 7604(b)); *United States* v. *Wodtke,* 543 F.2d 43, 44 (8th Cir. 1976).

2. That defendant's refusal, unless inadvertent or for other innocent reason, to obey this Court's Order of January 15, 1980 enforcing the IRS Summonses constituted civil contempt of this Court. *United States* v. *Asay, supra.*; *United States* v. *Peter,* 479 F.2d 147 (6th Cir. 1973); *United States* v. *Secor,* 476 F.2d 766 (2d Cir. 1973); *United States* v.

Wodtke, supra.; *United States* v. *Hankins*, 565 F.2d 1344, 1351-1352, and 581 F.2d 431, 437 (5th Cir. 1978), *cert. denied,* 440 U.S. 909 (1979).

3. That the burden of proof was on the defendant to show "categorically and in detail" why he failed to or was unable to comply with the Court's order. *NLRB* v. *Trans Ocean Export Packing*, 473 F.2d 612, 616 (9th Cir. 1973). *Cf. McPhaul* v. *United States*, 364 U.S. 372, 378-379 (1960). In failing to introduce any evidence at the contempt trial, Defendant has failed to show cause why he should not be held in civil contempt of Court.

4. That this Court's Order of January 15, 1980 became final and appealable when it was entered on January 16, 1980. *United States* v. *Asay, supra.* at pp. 659-660. The Order contained a specific finding of *in personam* jurisdiction. Defendant, with actual notice of the January 15, 1980 Order, failed to appeal. Thus, defendant is barred under the doctrine of res judicata from collaterally attacking the legal or factual basis of the Order in a subsequent contempt proceeding. *Daly* v. *United States*, 393 F.2d 873, 876 (8th Cir., 1968); *United States* v. *Asay, supra, United States* v. *Secor, supra*; *United States* v. *Peter, supra.* As Mr. Justice Jackson has stated:

> ". . . When (the Order) has become final, disobedience cannot be justified by re-trying the issues as to whether the Order should have been issued in the first place." *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948)

In any event, this Court had *in personam* jurisdiction by virtue of personal service of the Petitions to Enforce Summonses and Orders to Show Cause on defendant on November 20, 1979. *Daly* v. *United States, supra,* at p 875.

5. That defendant could not unilaterally oust this Court of jurisdiction by returning the Order to Show Cause to the United States Marshal, and refusing to file a responsive pleading or to appear at this Court's January 14, 1980 hearing on the Order to Show Cause. The government, by way of petition, affidavit and oral testimony of the agent who issued the summonses, made the showing required to establish a prima facie case for enforcement of the summonses under *United States* v. *Powell*, 379 U.S. 48 (1964) and *United States* v. *Church of Scientology of California*, 520 F.2d 818 (9th Cir. 1975). As no challenges were raised to that showing, the summonses should have been, and correctly were, ordered enforced. *United States* v. *Garden States Bank*, 607 F.2d 61, 70 (C.A. 3, 1979); *United States* v. *Stuart*, 587 F.2d 929, 930-931 (C.A. 8, 1978); *United States* v. *Newman*, 441 F.2d 165, 169 (C.A. 5, 1971). Furthermore, the evidence fully establishes that the Order to Show Cause, as well as the underlying IRS Summonses, were directed to defendant as a proper party. *United States* v. *Lucas General Contractors, Inc.*, 406 F. Supp. 1267, 1276-77 (D.S. Caro., 1975); *United States* v. *American Standard Remodeling Corp.*, 252 F. Supp. 690 (W.D. Pa. 1966).

6. That it is the responsibility of this Court to provide a fair, effective, and orderly judicial process. *United States* v. *Asay, supra*, at p. 659. If defendant had legitimate reasons for failing to comply with the IRS Summonses, a minimum respect for the processes of this Court requires that defendant, once served, state his reasons for noncompliance in response to this Court's initial Order to Show Cause. *Cf. United States* v. *Bryan*, 339 U.S. 323, 332-333 (1950). For at the time and place specified in said order, this

Court presented itself for the taking of testimony and hearing of argument. Defendant, in eschewing any participation in the Court proceedings, treated the Order to Show Cause as an "invitation to a game of hare and hounds" in which the respondent must produce the documents "only if cornered at the end of the chase". *United States* v. *Bryan, supra.* at p. 331. Such a strategy, as the decision in *Bryan* forewarns, is not without its risks.

7. That the Court acted within its discretion in the adjudication of both the civil and contempt charges in a consolidated action since they arise out of the same transaction or series of transactions. *United States* v. *United Mine Workers*, 330 U.S. 258, 398-300 (1947); *Mitchell* v. *Fiore*, 470 F.2d 1149, 1153 (3d Cir. 1972), *cert. denied*, 411 U.S. 938 (1973). In any event, the proceedings followed the procedures applicable to criminal contempt adjudications set forth in Fed. R. Crim. p. 42(b).

ORDER

ACCORDINGLY, IT IS ORDERED AND ADJUDGED, that Richard W. (Dick) Rylander is guilty of civil contempt;

IT IS FURTHER ORDERED that the matter of appropriate compensatory and compulsory relief is hereby continued to October 23, 1980 at 1:30 P.M.

DATED: October 23, 1980.

/s/ Lawrence K. Karlton
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Crim. S-80-44 LKK

(Civil No. S-79-570)
(Civil No. S-79-571)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICHARD W. (DICK) RYLANDER, SR., DEFENDANT

Filed Oct. 24, 1980

ORDER

1. By this Court's Order of October 23, 1980, the defendant in the above-entitled matters has been found in civil contempt for failure to produce documents in compliance with a previous court order and has been remanded to the custody of the Attorney General until such time as he purges himself of said contempt. That Order of October 23, 1980, is hereby stayed until November 19, 1980. On that date a hearing will be held regarding the defendant's purging of the contempt.

2. On October 9, 1980, at the conclusion of defendant's trial on the civil contempt charges, Joseph Harbison was appointed by this Court to represent the defendant in all proceedings regarding the purging of the civil contempt. Mr. Harbison was also appointed to advise the defendant as to all Fifth Amendment questions stemming from the defendant's conviction of criminal contempt and his subsequent dealings with the United States Probation Office. Mr. Harbison's appointment as to these matters shall continue.

3. The defendant has also requested that counsel be appointed to represent him on appeal from the civil contempt finding of this Court. Mr. Harbison is hereby appointed to represent the defendant on appeal from the civil contempt finding. *See Guidelines for the Administration of the Criminal Justice Act*, § 2.01(D)(1) Vol. VII Guide to Judiciary Policies and Procedures.

4. The appointment of Joseph Harbison herein made and confirmed is made subject to this Court's determination, upon conclusion of this case, as to whether funds are available for the payment of legal and other related services provided to the defendant by Mr. Harbison pursuant to 18 U.S.C. § 3006A(f). If the Court finds that such funds are available, it will order the defendant to remit payment to the Court for deposit in the Treasury as reimbursement to the appropriation, current at the time of payment, to carry out the provisions of 18 U.S.C. § 3006A. A hearing on that matter is deferred until resolution of the issue of purging of contempt or judgment and sentence on the criminal contempt whichever occurs first.

5. At the October 23, 1980, hearing before this Court the United States moved to strike the contents of the defendant's October 9, 1980, affidavit entitled Oath In Purgation of Contempt. That motion is hereby taken under submission, to be resolved at the November 19, 1980, hearing before this Court.

IT IS SO ORDERED.

OCTOBER 24, 1980.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Civ. No. S-79-570 LKK
79-571 LKK

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RICHARD W. RYLANDER, DEFENDANT

To William B. Schubb
United States Attorney

James A. Brennan
928 K St., Ste 201
Sacramento, California 95814

Rylander & Company Realtors
3333 Watt Ave., Ste 203
Sacramento, California 95814

Affiliated Investments & Mortgage
3333 Watt Ave., Ste 203
Sacramento, CA 95821

John T. Simon
3333 Watt Ave., Ste 203
Sacramento, CA 95821

Richard W. (Dick) Rylander Sr.
P.O.B. 13497
Sacramento, CA 95813

E. Richard Walker
United States Federal Defender

NOTICE

YOU ARE HEREBY NOTIFIED that judgment was entered in the above entitled case on 10-24-80.

J. R. GRINDSTAFF
Clerk, U.S. District Court

By: /s/ L. Wilson
L. WILSON, *Deputy Clerk*

Sacramento, California

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action File No. S-79-570 LKK
79-571 LKK

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RICHARD W. RYLANDER, DEFENDANT

Filed Oct. 24, 1980

JUDGMENT

This action came on for trial before the Court, Honorable Lawrence K. Karlton, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, October 24, 1980

It is Ordered and Adjudged pursuant to the findings of fact and conclusion of law and the court order of October 23, 1980, judgment is hereby entered in favor of the plaintiff and against the defendant in the above entitled case.

Dated at Sacramento, California, this 24th day of October, 1980.

J. R. GRINDSTAFF
Clerk of Court

By: /s/ L. WILSON
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S-79-570-LKK

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v

RYLANDER & CO., REALTORS, INC., ET AL.,
RESPONDENTS

Civil No. S-79-571-LKK

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

AFFILIATED INVESTMENTS & MORTGAGE CO., ET AL.,
RESPONDENTS

Filed Jan. 16, 1980

ORDER ENFORCING SUMMONS

The above related summons enforcement proceedings came on for hearing on January 14, 1980, upon previously issued Orders to Show Cause of this Court. Solomon E. Robinson, Assistant United States Attorney, appeared on behalf of Petitioners; no appearance was made by or on behalf of Respondents.

The Court heard an offer of proof and oral testimony and argument on the issues of (1) personal jurisdiction over the respondent corporations and (2) IRS possession of records requested in the summonses. Upon consideration of the foregoing, as well as the Declarations filed by Respondent Rylander, the verified petitions of Petitioner Van Den Berg, and the remaining records of these proceedings, the Court finds that it does have jurisdiction over the Respondents, and it is therefore hereby

ORDERED that Richard (Dick) Rylander, Sr. shall appear on Monday, February 4, 1980 at 10:00 a.m. before Joan Van Den Berg, or other person designated by Petitioner, at the office of the Internal Revenue Service at 801 I Street, Room 292, Sacramento, California, and then and there produce for Petitioner's inspection and copying the records described in the IRS summonses attached hereto as Exhibits A and B, except the following records described in Exhibit A:

1. Corporate books and records including cash receipts and cash disbursements, journals and ledgers; for the period of January 1, 1975 to March 31, 1975 for RYLANDER & CO. REALTORS, INC.
2. Payroll records of corporate officers, directors, employees and sub-contract labor including payment to real estate agents, secretarial help, etc. Form W-2's, Wage and Tax Statements; Form 1099's, Miscellaneous Income Statement; Form 941, Quarterly Statement of Employee's Earnings; and Form 940, Annual Unemployment Tax Return for the period of January 1, 1975 to March 31, 1975.

3. Check record of RYLANDER & CO. REALTORS, INC. including deposit slips, record showing source of deposits, bank statements, checks and check record showing purpose of checks issued for the period of January 1, 1975 to March 31, 1975.

ORDERED, this 15th day of January, 1980, at Sacramento, California.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
United States District Court Judge

★ U. S. GOVERNMENT PRINTING OFFICE: 1981 358582 710

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1120

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT,
PETITIONERS

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC., AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

JOINT APPENDIX

JOSEPH F. HARBISON, III
Clark & Harbison
2220 K Street
P.O. Box 160327
Sacramento, California 95816
(916) 448-5501

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

**PETITION FOR WRIT OF CERTIORARI FILED
DECEMBER 15, 1981
CERTIORARI GRANTED APRIL 26, 1982**

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT,
PETITIONERS

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC., AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

JOINT APPENDIX

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CVS–79–570 PCW

DATE 1979	NR.	PROCEEDINGS
8–10	1	Petn. no sums.
		Ldg OSC
8–13	2	Notc of related cases—(Civ S–79–571 LKK)
		Ldgd ord of reassign
8–14	3	*Order:* Reassign Civ S–79–571 LKK to PCW
	4	*O.S.C. Hrg*—10–15–79.
10–15		*Minutes:* OSC hrg cont to date set by US Atty.
10–16		Ldgd OSC.
10–24	5	*OSC Hrg:* 12–3–79
10–31		Ldgd OSC
11–6	6	Order to Show Cause: 12–10–79 before LKK
11–13		Ldgd OSC.
11–14	7	Retn unserved OSC.
11–19	8	*OSC*. Hrg 1–14–79
11–30	9	Retn exec OSC.
12–10		Rec'd cpy's of ltrs addressed to Ms. Griffin, Deputy USM.
1980		
1–9		Rec'd Dec. of R. Rylander
1–14		Ldgd Ord enforcing summons
		Minutes: Order Show Cause granted. Pltf to prep ord.
1–16	10	Ord: Enforce summons.
2–5	11	Retn exec ord re sums.
2–7	12	Decl of Joan M. Van Den Berg.
		Ldgd OSC.
	13	Petn to enforce courts order.
2–11	14	Ord: Show Cause hrg set for 3–10–80
2–21	15	Rtn sums. Unexec.
2–22	16	Petn to enforce court order.
	17	Declar of Joan M. Van Den Berg.
		Ldgd ord to show cause.
2–25	18	Ord: Show Cause set for 3–24–80.
3–24	19	Declar of R. Rylander re 3–24–80 hrg date.
		Minutes: Pltf OCS dropped off cal. Pltf to prep ord.
3–28		Ldgd ord re comtempt. (not signed.)
	20	*ORD:* show cause set for 4–14–80 @ 9:30 re criminal contempt.
4–15	21	Rtn sums re OSC unexec.
		Minutes: OSC cont to 5–27–80 @ 9:30. Pltf to prep order.
4–17		Ldgd ord grnt petn to SC why deft should not be in contempt. (orig in CR S–80–44)

DATE 1979	NR.	PROCEEDINGS
4–23	22	*ORD:* Show cause hrg set for 5–27–80 @ 9:30. (orig in CR.S 80–44)
4–24	23	Notc of related case to: 80–313, 79–571
4–29	24	*ORD:* reassigning case # 80–313 to LKK.
		Copy of OSC set for 6–2–80.
5–27		*Minutes:* B/W iss. Bail @ $25,000.
7–8	25	ORD: exparte appl for court ord.
8–22	26	Memo in oppo to jury demand.
9–5		Rec'd copy of memo pts & auth in suppt of reg for J/T. in Cr. S-80–44
9–9	27	Proof of service.
9–24		Order
10–24	28	*ORD:* Findg's of Fact & Concl of Law re civil contempt.
	29	*ORD:* Deft remanded to cust of USM; stayed pend hrg of 11–19–80. *J. Harbison appt re contempt* chrgs & 5th Am question & *appeal purposes.* Mot/strike under submission.
	30	Judgtment entered this date. Mld notc.
		Ltr of deft cnsl to crt re hrg of 10–23–80.
10–30	31	Govt memo in suppt of mot/strike oath in purgation of contempt & release of rcrds.
10–31	32	Govt ans to pleading in purgation of contempt.
		Rtn notc of entry of judgt-refused.
11–6	33	Deft brief re 5th amendmnt privilege.
–13	34	Pltf closing brief.
–19		*Minute Entry:* deft is remand to the custody of USM for impris in jail type institution until docs or test are produced. incarceration is stayed unitl 12–12–80 so that he can seek further stay or writ.
–21	35	Deft mot/purge civil contempt. 12–3–80.
	36	Deft mot/new trial non jury case.
	37	Deft aff of Joseph F. Harbison, III.
–25		Minute Entry: hrg on 12–3–80 has been chngd from 10:30 to 9:00.
–26	38	Deft notc & mot/new tl. 12–3–80 @ 9:00
	39	Deft appl for ord shorten time.
	40	Aff of J. F. Harbison.
	41	Cert of serv.
	42	*ORD:* grnt mot/shortne time.
1–28	43	Pltf oppo to mot/purge & new tl.
12–2	44	Rtn sums Exec. (APEX Bookkeeping)
12–3		*Minutes:* deft mot/new tl denied. Deft did not purge. Deft mot/stay exec of sentence grntd to 12–16–80 @ 12:00 noon. Deft mot/appt cnsl for crim appeal grntd.
12–5	45	NOTICE OF APPEAL. no fee pd. CA–#80–4594
	46	Deft notc to designate transcripts.

DATE 1979	NR.	PROCEEDINGS
	47	Deft notc & mot/stay be consolidated w/ CR.S–80–44 LKK
	48	Deft appl for ord shorten time.
	49	Aff of J. F. Harbison in suppt of mot/stay.
2–5	50	*ORD:* shorten time for notc & mot/further stay grntd.
	51	*Deft notc & mot/consolidate CR.S–80–44 & civil actions for appeal. 12–9–80*
2–9	52	Deft proof of serv.
		Minutes: deft mot/consolidate & stay submitted.
2–10	53	Deft addition to notc to designate transcripts.
12–11	54	*ORD:* deny mot/consolidate; deft mot/bail pending appeal or stay denied; deft mot/appt cnsl for crim appeal grntd.
2–17		Rec'd copy of ord frm CA–9 re briefing schedule & mot/stay grntd.
2–23		Rec'd copy of ord from CA–9 consolidating actions for appeal, & setting Briefing schedule. (consolidation refers to civil actions only.)

Herman Sillas
United States Attorney
Solomon E. Robinson
Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, Califonia 95814
Telephone: (916) 440-2331

In The United States District Court
For The Eastern District of California

Civil No. CIVS 79–570–PCW

United States of America and
Joan M. Van Den Berg, Special Agent, IRS,
Petitioners,

v.

Rylander & Co. Realtors, Inc., and
Richard W. Rylander, Sr., President,
Rylander & Co., Realtors, Inc., *Respondents*.

PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

COMES NOW the United States of America and Joan M. Van Den Berg, Special Agent, Internal Revenue Service, by and through their undersigned attorneys, and respectfully show unto this Court as follows:

I

This is a proceeding brought under the authority of sections 7402(b) and 7604(a) of the Internal Revenue Code of

1954 (26 U.S.C.) to judicially enforce an Internal Revenue Summons.

II

a. Petitioner Joan M. Van Den Berg is a Special Agent of the IRS, employed in the Criminal Investigation Division of the Office of the District Director of Internal Revenue at Sacramento, California.

III

a. The respondent, Rylander and Co. Realtors, Inc., is a real estate organization which maintains an office for the conduct of its business at Suite 202, 3333 Watt Avenue, Sacramento, California, within the jurisdiction of this Court.

b. The respondent, Richard W. Rylander, Sr., President of Rylander & Co., Realtors, Inc., may be served with process herein at the aforesaid office of said respondent Rylander & Co., Realtors, Inc.

IV

SA Joan M. Van Den Berg is conducting an investigation to determine the correct income tax liability of Richard W. Rylander, Sr., for the years 1973 through 1977, as set forth in the Declaration of SA Van Den Berg, attached hereto as Exhibit B.

V

The respondents are in possession and control of testimony and documents which are relevant and material to the above-described investigation.

VI

On January 4, 1979, an Internal Revenue Summons, a copy of which is attached hereto as Exhibit A, was issued by petitioner SA Van Den Berg, directing the respondents to appear before her on January 22, 1979, at Room 292, 801 I Street, Sacramento, California, as is set forth in the Declaration of Joan M. Van Den Berg, attached hereto as Exhibit B. The summons directed the respondents to testify and to produce for examination the various books and records as are described upon the face of said sumons. This summons was served upon the respondents by SA Van Den Berg, who handed an attested copy thereof to the respondent, Richard W. Rylander, Sr., on January 4, 1979, as is set out in the Declaration of Joan M. Van Den Berg, attached hereto as Exhibit B.

VII

On January 22, 1979, the respondent, Richard W. Rylander, Sr., appeared at the IRS office at Sacramento, California, but failed to comply with the summons by producing the books, records and other documents demanded in the summons or by giving testimony as to the matters requested in said summons.

VIII

By virtue of the failure of respondents to comply with the summons, the testimony and documents sought by the summons have not been provided to the petitioners.

IX

The testimony and documents sought by the summons described in Paragraph VI above are relevant to and can reasonably be expected to cast light upon the correct Federal tax liabilities of Richard W. Rylander, Sr., for the years under investigation, 1973 through 1977. It is essential to complete the investigation of said tax liabilities that the respondents testify and produce the materials demanded by the summons, as is set out in the Declaration of Joan M. Van Den Berg, attached hereto as Exhibit B.

X

The information sought by the summons is not already in the petitioners' possession.

WHEREFORE, the petitioners, the United States of America, and SA Van Den Berg respectfully pray:

1. That this Court enter an Order directing the respondent to show cause, if any they have, why they should not comply with and obey the summons attached hereto as Exhibit A in each and every requirement thereof;

. . .

2. That this Court enter an Order directing the said respondents to obey the summons attached hereto as Exhibit A in each and every requirement thereof by testifying and producing the documents required and called for by the terms of the summons before the petitioner, SA Van Den Berg, or any other proper officer of the IRS at such time and place as hereafter may be fixed by the petitioner, SA Van Den Berg, or any other proper officer of the IRS.

3. That this Court grant the petitioners the costs of this action and such other and further relief as it deems just and proper.

/s/ ________________________
HERMAN SILLAS
United States Attorney

/s/ ________________________
SOLOMON E. ROBINSON
Assistant U.S. Attorney

JULY 24, 1979

Form 2039
(Rev. 3-77)

Summons

In the matter of the tax liability of
RICHARD W. RYLANDER, SR.
3333 Watt Avenue, Suite 202
Sacramento, CA 95821

Internal Revenue District of San Francisco

Periods January 1, 1973 to December 31, 1977

The Commissioner of Internal Revenue

To RICHARD W. RYLANDER, SR., President of
RYLANDER & CO. REALTORS, INC. (Suite 202)
At 3333 Watt Avenue, Sacramento, CA 95821

You are hereby summoned and required to appear before Special Agent JOAN VAN DEN BERG an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

1. Corporate books and records including cash receipts and cash disbursements, journals and ledgers; for the period of January 1, 1975 to December 31, 1977 for RYLANDER & CO. REALTORS, INC.

2. Payroll records of corporate officers, directors, employees and sub-contract labor including payment to real estate agents, secretarial help, etc. Form W-2's, Wage and Tax Statements; Form 1099's, Miscellaneous Income Statement; Form 941, Quarterly Statement of Employee's Earnings; and Form 940, Annual Unemployment Tax Return for the period of January 1, 1975 to December 31, 1977. (continued on attached sheet)

Business address and telephone number of Internal Revenue Service officer named above:

801 I St., Rm. 292, Sacramento, CA 95814 (916) 440-3130

Place and time for appearance:

at 801 I. Street, Room 292, Sacramento, Calif. 95814

on the 22 day of January, 19 79 at 9 o'clock A.M.

Issued under authority of the Internal Revenue Code

this 4 day of January, 19 79

Joan M. Van Den Berg
Signature of Issuing Officer

Special Agent
Title

Richard C Mounkes
Signature of Approving Officer
(if applicable)

Group Manager
Title

Original to be retained by IRS

Form 2039 (Rev. 3-77)
EXHIBIT A

Certificate of Service of Summons and Notice

(Pursuant to section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date January 4, 1979	Time 8:50 a.m.

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed.

Richard W. Rylander

☐ I left an attested copy of the summons at the last and usual place of abode of the person to whom it was directed. I left the copy with the following person (if any).

Signature Joan M. VanDenBerg	Title Special Agent

This certificate is made to show compliance with section 7609, Internal Revenue Code. This certificate applies only to summonses served on third-party recordkeepers and not to summonses served on other third parties or any officer or employee of the person to whose liability the summons relates nor to summonses in aid of collection, to determine the identity of a person having a numbered account or similar arrangement, or to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.

I certify that, within 3 days of serving the summons, I gave notice (Form 2039-D) to the person named below on the date and in the manner indicated.

Date of Giving Notice: ____________ Time: ____________

Name of Noticee: ____________

Address of Noticee (if mailed): ____________

How Notice Was Given

☐ I gave notice by certified or registered mail to the last known address of the noticee.

☐ In the absence of a last known address of the noticee, I left the notice with the person summoned.

☐ I gave notice by handing it to the noticee.

☐ I left the notice at the last and usual place of abode of the noticee. I left the copy with the following person (if any).

☒ No notice is required.

Signature Joan M. VanDenBerg	Title Special Agent

Form 2039 (Rev. 3-77)

Attachment to summons in re:
RICHARD W. RYLANDER, SR.
3333 Watt Avenue, Suite 202
Sacramento, CA 95821

3. Check record of RYLANDER & CO. REALTORS, INC. including deposit slips, record showing source of depots, bank statements, checks and check record showing purpose of checks issued for the period of January 1, 1975 to December 31, 1977.

4. Clients trust records of property managed for Rents Collected and Disbursement of Expenses and clients trust check records including deposit slips, record showing source of deposits, bank statements, checks issued and check record showing purpose of checks issued for the period of January 1, 1973 to December 31, 1977, including the following listed properties:

   (1) 5231 60th Street
   (2) 3308 Wemberly
   (3) 588 Southgate
   (4) 3639 Pinnell
   (5) 3608 Mahogany
   (6) 2109 Grand Avenue
   (7) 2111 Grand Avenue
   (8) 9024 Central Avenue
   (9) 8787 Sunset
   (10) 4441 39th Street
   (11) 3928 Santa Fe Street
   (12) 7320 Filbert Avenue
   (13) 6601 24th Street (joint venture)

Herman Sillas
United States Attorney
Federal Building, Room 2058
650 Capitol Mall
Sacramento, California 95814
Telephone: 916-440-2331

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIVIL No.

United States of America, Joan M. Van Den Berg,
Special Agent, Internal Revenue Service,
Petitioners,

v.

Rylander & Co. Realtors, Inc., and
Richard W. Rylander, Sr., President,
Rylander & Co., Realtors, Inc., *Respondents.*

DECLARATION OF JOAN M. VAN DEN BERG

I, JOAN M. VAN DEN BERG, declare that:

1. I am a duly commissioned Special Agent of the Internal Revenue Service, employed in the Criminal Investigation Division of the District Director of Internal Revenue at Sacramento, California, and, as such, am authorized to issue and serve Internal Revenue summonses:

2. In my capacity as a Special Agent, I am conducting an investigation for the purpose of ascertaining the correct income tax liability of Richard W. Rylander, Sr., for the years 1973 through 1977.

3. On January 4, 1979, as part of the above investigation and in accordance with sections 7602 and 7603 of the Inter-

nal Revenue Code of 1954 (26 U.S.C.), an Internal Revenue summons, a copy of which is attached hereto as Exhibit A, was issued by me directing the captioned respondents to appear before me on January 22, 1979, at Room 292, 801 I Street, Sacramento, California. The summons directed said respondents to testify and to produce for examination the various books and records as are described upon the face of said summons. The summons was served upon said respondents by me handing an attested copy thereof to the respondent, Richard W. Rylander, Sr.

4. On January 22, 1979, the respondent, Richard W. Rylander, Sr., appeared at the Internal Revenue Service Office at Sacramento, California, but failed to comply with the summons by providing the books, records and other documents demanded in the summons or by giving testimony as to the matters requested in said summons.

5. ....
.... The respondents' refusal to comply with the summons continues to the date of this declaration.

6. The books, papers, records, or other data sought by the summons are not in my possession, nor have they been examined by me.

7. It is necessary to examine the books, records, and other papers demanded by the summons, and to take the testimony of the respondents in order to ascertain the correct income tax liability of Richard W. Rylander, Sr., for the years 1973 through 1977.

I, Joan M. Van Den Berg, declare under penalties of perjury that the foregoing is true and correct.

/s/ ______________________________
JOAN M. VAN DEN BERG

AUGUST 10, 1979

CERTIFICATE OF SERVICE BY MAIL

Civil No. ___

USA, ET AL.,

v.

RYLANDER & CO. REALTORS, ET AL.

The undersigned hereby certifies that she is an employee in the Office of the U.S. Attorney for the Eastern District of California, and is a person of such age and discretion as to be competent to serve papers.

That on 8/10/79 she served a copy of the attached PETITION TO ENFORCE INTERNAL REVENUE SUMMONS; DECLARATION; PROPOSED ORDER TO SHOW CAUSE by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the U.S. Mail at Sacramento, CA.

Addressee(s):

Richard W. Rylander, Sr. President
Rylander & Co. Realtors, Inc. (Suite 202)
3333 Watt Avenue, Sacramento, CA 95821

/s/ ______________________
DIANE KELLY

Form 2039
(Rev. 3-77)

Summons

In the matter of the tax liability of
RICHARD W. RYLANDER, SR.
3333 Watt Avenue, Suite 202
Sacramento, CA 95821

Internal Revenue District of San Francisco

Periods January 1, 1973 to March 31, 1978

The Commissioner of Internal Revenue

To RICHARD W. RYLANDER, SR., President of AFFILIATED INVESTMENTS & MORTGAGE COMPANY dba AIM REAL ESTATE MARKETING AND COUNSELLING

At 3333 Watt Avenue, Suite 202, Sacramento, CA 95821

You are hereby summoned and required to appear before Special Agent JOAN VAN DEN BERG an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

1. Corporate books and records including cash receipts and cash disbursements, journals and ledgers; for the period of January 1, 1973 to March 31, 1978 for AFFILIATED INVESTMENTS & MORTGAGE COMPANY, dba AIM REAL ESTATE MARKETING AND COUNSELLING;
2. Corporate payroll records for corporate officers, directors, employees and subcontract labor including payment to real estate agents, secretarial help, etc. Form W-2's, Wage and Tax Statements; Form 1099's, Miscellaneous Income Statement; Form 941, Quarterly Statement of Employee's Earnings; and Form 940, Annual Unemployment Tax Return for the period of January 1, 1973 to December 31, 1977.

(continued on attached sheet)

Business address and telephone number of Internal Revenue Service officer named above:

801 I St., Rm. 292, Sacramento, CA 95814 (916) 440-3130

Place and time for appearance:

at 801 I Street, Room 292 Sacramento, Calif.

on the 22 day of January 19 79 at 9 o'clock A. M.

Issued under authority of the Internal Revenue Code

this 4 day of January 19 79

Joan M. Van Den Berg
Signature of Issuing Officer

Special Agent
Title

Signature of Approving Officer
(if applicable)

Group Manager
Title

Original to be retained by IRS

Form 2039 (Rev. 3-77)

EXHIBIT A

GOVERNMENT
EXHIBIT
27

Certificate of Service of Summons and Notice

(Pursuant to section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date January 4, 1979	Time 8:50 a.m.

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed.

Richard W. Rylander

☐ I left an attested copy of the summons at the last and usual place of abode of the person to whom it was directed. I left the copy with the following person (if any).

Signature Joan M. Van Den Berg	Title Special Agent

This certificate is made to show compliance with section 7609, Internal Revenue Code. This certificate applies only to summonses served on third-party recordkeepers and not to summonses served on other third parties or any officer or employee of the person to whose liability the summons relates nor to summonses in aid of collection, to determine the identity of a person having a numbered account or similar arrangement, or to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.

I certify that, within 3 days of serving the summons, I gave notice (Form 2039-D) to the person named below on the date and in the manner indicated.

Date of Giving Notice: ______ Time: ______

Name of Noticee: ______

Address of Noticee (if mailed): ______

How Notice Was Given

☐ I gave notice by certified or registered mail to the last known address of the noticee.

☐ In the absence of a last known address of the noticee, I left the notice with the person summoned.

☐ I gave notice by handing it to the noticee.

☐ I left the notice at the last and usual place of abode of the noticee. I left the copy with the following person (if any).

☒ No notice is required.

Signature Joan M. Van Den Berg	Title Special Agent

Form 2039 (Rev. 3-77)

Attachment to Summons in re:
RICHARD W. RYLANDER, SR.
3333 Watt Ave., Suite 202
Sacramento, CA 95821

3. Check Record for AFFILIATED INVESTMENTS & MORTGAGE COMPANY, including deposit slips, record showing source of deposits, bank statements, checks issued and check record showing purpose of checks issued for the period January 1, 1973 to March 31, 1978.

4. Clients trust records of property managed for Rents Collected and Disbursement of Expenses; and clients trust check records including deposit slips, record showing source of deposits, bank statement, checks issued and check record showing purpose of checks issued for the period of January 1, 1973 to December 31, 1977, for the following listed properties:

   (1) 5231 60th Street
   (2) 3308 Wemberly
   (3) 588 Southgate
   (4) 3639 Pir [illegible]
   (5) 3608 Mahogany
   (6) 2109 Grand Avenue
   (7) 2111 Grand Avenue
   (8) 9024 Central Avenue
   (9) 8787 Sunset
   (10) 4441 39th Street
   (11) 3928 Santa Fe Street
   (12) 7320 Filbert Avenue
   (13) 6601 24th Street

5. Corporate records of "Broker Demand Statement" (copyright 1975) issued to clients by AIM REAL ESTATE MARKETING & COUNSELLING for the period of January 1, 1973 to March 31, 1978;

6. Corporate records of "Contract of Employment" with clients issued by AIM REAL ESTATE MARKETING & COUNSELLING for the period of January 1, 1973 to March 31, 1978.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S–79–570

UNITED STATES OF AMERICA, ET AL., *Petitioners*,

v.

RYLANDER & CO., REALTORS, INC., ET AL., *Respondents*.

ORDER TO SHOW CAUSE

Upon the Petition, the Exhibits attached thereto, the Declaration of Joan M. Van Den Berg, Special Agent of the Internal Revenue Service, and upon the motion of Herman Sillas, United States Attorney for the Eastern District of California.

IT IS ORDERED that Respondents appear before the District Court of the United States for the Eastern District of California, in that branch thereof presided over by the undersigned, in his Courtroom, second floor, Federal Building, 650 Capitol Mall, Sacramento, California on Jan. 14, 1980, at 10:00 a.m. to show cause why they should not be compelled to testify and to produce the records demanded in the IRS summons served upon them on January 4, 1979, by petitioner Joan M. Van Den Berg.

LET A COPY OF THIS ORDER be served by petitioners upon respondents and upon Richard W. Rylander, Sr., before the 20th day of December, 1979.

IT IS FURTHER ORDERED that within ten days after service upon respondents of copies of this order, the respondents and Richard W. Rylander, Sr., taxpayer, shall file and serve a written response to the Petition, supported by the appropriate affidavit(s), as well as any motions they desire to make. All motions and issues raised by the pleadings will be considered on the return date of this Order. Only those issues raised by motion or brought into controversy by the responsive pleadings and supported by affidavit(s) will be considered at the return of this Order and any uncontested allegation in the Petition will be considered admitted. The United States of America's reply, if any, is due no later than January 1, 1980.

DATED at Sacramento, California, this 19th day of November, 1979.

/s/ ______________________________

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Civil S 79–570 LKK

USA

vs

RYLANDER & CO.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, United States District Court, Eastern District of California.

That on November 19, 1979 I served a copy of the attached Order to Show Cause by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the United States Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptacle located in the Clerk's Office.

SERVED BY MAIL
Mr. Richard Rylander
Rylander & Co Realtors, Inc
3333 Watt Avenue
Sacramento, CA 95821

SERVED BY INTER-OFFICE DELIVERY
LKK
AUSA Robinson
US Marshal

TO: CLERK
Federal District Court for the Eastern District of California
650 Capitol Mall
Sacramento, California 95814

Dear Sir:

Please file the following Declaration of Richard W. Rylander, Sr., in Case No. (civil) S–79–570 LKK.

Thank you.

* * * *

DECLARATION OF RICHARD W. RYLANDER, SR.

I, Richard W. Rylander, Sr., declare that;

The copy of the letter and contents therein, attached hereto, and addressed to Ms. Carolyn Griffin, Deputy US Marshal, dated December 7, 1979, is hereby made a part of this Declaration; and I further declare that:

I am not President of Rylander & Co. Realtors, Inc.; nor was I President of Rylander & Co. Realtors, Inc. at the time said papers were handed to me as set forth in the herein referenced letter; nor was I President of Rylander & Co. Realtors, Inc. at the time I was handed the IRS administrative summons form (form 2039) on January 4, 1979; nor am I associated with such Corporation, if any there be.

I, Richard W. Rylander, Sr., declare under penalty of perjury that the foregoing is true and correct.

Dated this 8th day of January, 1980, at Chico, California.

/s/ ______________________
RICHARD W. RYLANDER, SR.
3333 Watt Avenue, Suite 203
Sacramento, California 95821
Telephone: (916) 481-1209

RICHARD W. (DICK) RYLANDER, SR.
3333 Watt Avenue, Suite 203
Sacramento, California 95821
Telephone: (916) 481-1209

December 7, 1979

U.S. Court

U.S. District Court for the Northern District of California
650 Capitol Mall
Sacramento, California 95314

Re: Civ S–79–570 LKK; and S–79–571 LKK

Dear Sir:

Please file the copies of the enclosed letters addressed to Ms. Carolyn F. Griffin, Deputy U.S. Marshal, in the appropriate case files.

I was served as an officer of the Companies cited. I am *not* an officer of the Companies cited in the referenced actions, nor am I associated with said Corporations.

Thank You.

Sincerely,

/s/ ________________________
RICHARD W. (DICK) RYLANDER, SR.

RWR/

Enclosures

Richard W. (Dick) Rylander, Sr.
3333 Watt Avenue, Suite 203
Sacramento, California 95821
Telephone: (916) 481-1209

December 7, 1979 CERTIFIED MAIL (RRR)
Receipt No. 9091164

Ms. Carolyn F. Griffin
Deputy U.S. Marshal
1-020 U.S. Courthouse
Sacramento, California 95814

Re: Return of Documents (Civ S-79-570 LKK)

Dear Ms. Griffin:

I am returning the enclosed ORDER TO SHOW CAUSE, PETITION TO ENFORCE INTERNAL REVENUE SUMMONS and DECLARATION OF JOAN M. VAN DEN BERG, re: RYLANDER & CO. REALTORS, INC., and RICHARD W. RYLANDER, SR., President, RYLANDER & CO., REALTORS, INC.

I cannot accept service for the above as I am not President of Rylander & Co., Realtors, Inc., and for me to hold the above documents and do or say nothing would be to imply that I am President of Rylander & Co., Realtors, Inc. and that your service was good and that proper parties were served—when in fact such is not the case.

As you recall, Friday morning last, when you handed me the above papers in the hallway, you asked if I was Mr. Rylander and I said 'yes'. You then said you had papers for me and handed them to me. I told you that I could not read them without my glasses and I asked you if there was some date that I had to appear someplace set forth in the papers, and you told me you thought it was the "14th of January". I then checked your I.D. and asked for one of your cards. I was in a hurry as I was behind schedule to return back up north. I was not able to read the above papers at the time you handed them to me due to poor light and the fact that I did not have my glasses. Nothing was said by you as to 'who' the papers were for other then for your asking me "if I was Mr. Rylander"—under the circumstances, I assumed that the papers were for me personally. Had I known at the time you handed me the above paper that they were for Rylander & Co., Realtors, Inc. and its President, I would have told you that I could not accept them because I was not said corporation's President—and I would have refused them.

I am sending a copy of this letter to the Clerk of the District Court for their information. If you have any questions, please feel free to contact me at the above.

Sincerely,

/s/ ________________________________
RICHARD W. (DICK) RYLANDER, SR.

RWR/

ENCLOSURES

RICHARD W. (DICK) RYLANDER, SR.
3333 Watt Avenue, Suite 203
Sacramento, California 95821
Telephone: (916) 481-1209

December 7, 1979

CERTIFIED MAIL (RRR)
Receipt No. 9091165

Ms. Carolyn F. Griffin
Deputy U.S. Marshal
1–020 U.S. Courthouse
Sacramento, California 95814

Re: Return of Documents (Civ S–79–571 LKK)

Dear Ms. Griffin:

I am returning the enclosed ORDER TO SHOW CAUSE, PETITION TO ENFORCE INTERNAL REVENUE SUMMONS and DECLARATION OF JOAN M. VAN DEN BERG, re: AFFILIATED INVESTMENTS & MORTGAGE COMPANY dba AIM REAL ESTATE MARKETING AND COUNSELLING and RICHARD W. RYLANDER, SR., President.

I cannot accept service for the above as I am not President of Affiliated Investments & Mortgage Company dba AIM Real Estate Marketing and Counselling and for me to simply hold the above documents and say nothing would be to imply that your service was good and that the proper parties were properly served—when in fact such is not the case.

As you recall, Friday morning last, when you handed me the above papers in the hallway, you asked if I was Mr. Rylander and I said 'yes'. You then said that you had some papers for me, at which time I told you that I could not read them without my glasses and was there some date that I had to appear someplace as I was in a hurry and had to return back up north. You told me that you believed it said the "14th of January". I then asked for your I.D. and if you had a card so I could have your name. You showed me your I.D. and gave me your card—you then also handed me a billing for fees for services that your office has made for me in the amount of $34.84. Nothing was said about 'who' the papers you handed me pertained to, I assumed they were for me personally. Had I known at the time you handed me the papers that they were for who they were, I would have told you that I could not accept them—and I would have refused them.

I am sending a copy of this letter to the Clerk of the District Court for their information. If you have any questions, please feel free to contact me at the above.

Sincerely,

/s/ ____________________________
RICHARD W. (DICK) RYLANDER, SR.

RWR/

ENCLOSURES

Herman Sillas
United States Attorney
Solomon E. Robinson
Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, California 95814
Telephone: (916) 440-2331

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S-79-570-LKK

United States of America, et al., *Petitioners,*

v.

Rylander & Co., Realtors, Inc., *Respondents.*

Civil No. S-79-571-LKK

United States of America, et al., *Petitioners,*

v.

Affiliated Investments & Mortgage Co., et al.,
Respondents.

PETITION TO ENFORCE COURT'S ORDER

Petitioners, the United States of America and Joan M. Van Den Berg, Special Agent, Internal Revenue Service, by their attorneys, show unto this Court the following:

1. This action was commenced to enforce Internal Revenue Service summonses issued to the respondents on January 22, 1979 by the petitioner, Special Agent Joan M. Van Den Berg, Internal Revenue Service.

2. At the hearing on this matter on January 14, 1980, and by Order entered January 15, 1980, which was served on respondent Richard W. Rylander, Sr., to obey the summonses and "to produce for petitioner's inspection and copying the records and documents described in the subject

Internal Revenue summonses" on Monday, February 4, 1980 at 10:00 a.m.

3. Respondent Richard W. Rylander, Sr., appeared on said date, but refused and failed to produce any of the records of respondents, Rylander & Co., Realtors, Inc. or Affiliated Investment & Mortgage Co., as requested by said summonses and ordered by this Court.

4. The information and documents sought by the summonses are essential to the completion of the investigation of the tax liability of Richard W. Rylander, Sr. for the years 1973 through 1977.

WHEREFORE, the petitioners, the United States of America and Special Agent Joan M. Van Den Berg, pray:

(a) That this Court require respondent Richard W. Rylander, Sr. to show cause, if any he has, why he should not be held in contempt for his failure to comply with this Court's Order of january 15, 1980;

(b) That this Court determine that the respondent Richard W. Rylander, Sr. is in contempt of the Court Order of January 15, 1980, and levy a fine against him in an amount equal to all expenses and costs incurred by the petitioners in order to obtain compliance with the Court's Order enforcing the subject Internal Revenue summonses;

(c) That the Court order the respondent, Richard W. Rylander, Sr., to immediately comply with the Order enforcing the subject Internal Revenue summonses by producing the records and documents called for therein; and

(d) That the Court grant the petitioners such other and further relief as is necessary and proper.

DATED: February 6, 1980

HERMAN SILLAS
United States Attorney

/s/ ____________________________
SOLOMON E. ROBINSON
Assistant U.S. Attorney

HERMAN SILLAS
United States Attorney
SOLOMON E. ROBINSON
Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, California 95814
Telephone: (916) 440–2331

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S–79–570–LKK

DECLARATION OF JOAN M. VAN DEN BERG

UNITED STATES OF AMERICA, ET AL. *Petitioners,*

v.

RYLANDER & CO., REALTORS, INC., ET AL., *Respondents.*

Civil No. S–79–571–LKK

DECLARATION OF JOAN M. VAN DEN BERG

UNITED STATES OF AMERICA, ET AL., *Petitioners,*

v.

AFFILIATED INVESTMENTS & MORTGAGE CO., ET AL., *Respondents.*

I, Joan M. Van Dem Berg, declare that:

1. I am a duly commissioned Special Agent of the Internal Revenue Service employed in the Criminal Investigation Division of the Office of the District Director of Internal Revenue, at Sacramento, California, and a petitioner herein.

2. I am conducting an investigation to determine the correct federal tax liabilities of Richard W. Rylander, Sr., for the years 1973 through 1977.

3. I am familiar with the Order issued by the Court on January 15, 1980, and entered herein on January 16, 1980 requiring the respondent Richard W. Rylander, Sr., officer of the corporate respondents, to obey and comply with the Internal Revenue summonses issued to him on January 22, 1979.

4. Pursuant to the Order I met on February 4, 1980 with the respondent Richard W. Rylander, Sr., to inspect the summoned records, but no part of said summoned corporate records were made available to the petitioner for inspection and copying.

5. The summoned records and documents of the corporate respondents remain essential to complete my investigation of the tax liabilities of responder Richard W. Rylander, Sr., for the years 1973 through 1977.

I, Joan M. Van Den Berg, declare under penalty of perjury that the foregoing is true and correct.

/s/ ______________________________

Joan M. Van Den Berg
Special Agent
Internal Revenue Service

HERMAN SILLAS
United States Attorney
SOLOMON E. ROBINSON
Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, California 95814
Telephone: (916) 440–2331

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil No. S–79–570–LKK

ORDER TO SHOW CAUSE

UNITED STATES OF AMERICA, ET AL., *Petitioners*,

v.

RYLANDER & CO., REALTORS, INC., ET AL., *Respondents.*

Civil No. S–79–571–LKK

ORDER TO SHOW CAUSE

UNITED STATES OF AMERICA, ET AL., *Petitioners*,

v.

AFFILIATED INVESTMENTS & MORTGAGE CO., ET AL., *Respondents.*

Upon consideration of the Petition to Enforce Court's Order, and the Affidavit of Joan M. Van Den Berg, it is

ORDERED that RICHARD W. RYLANDER, SR. appear before the United States District Court for the Eastern district of California, in the branch thereof presided over by the undersigned on the 10th day of March, 1980, at 10:00 a.m., to show cause why he should not be held to be in contempt of this Court's Order of January 15, 1980, requiring him to obey the Internal Revenue summonses issued to him on January 22, 1979, and to show cause why he should not immediately comply with said Order by producing the records and documents of respondent corporations. It is further

ORDERED that copies of this Order, the Petition and Affidavit be served upon the respondent Richard W. Rylander, Sr. on or before the 20th day of February, 1980. It is further

ORDERED that on or before March 3, 1980, the respondent Richard W. Rylander, Sr. shall file and service a written response to the Petition, supported by appropriate affidavit(s), as well as any motions he desires to make. All motions and issues raised by the pleadings will be considered on the return date of this Order. Only those issues raised by motion or brought into controversy by the responsive pleadings and supported by affidavit(s) will be considered at the return of this Order and any uncontested allegation in the Petition will be considered admitted.

DATED at Sacramento, California, this 8th day of February, 1980.

/s/ ______________________________
United States District Court Judge

CERTIFICATE OF SERVICE

Case No. Civ. S–79–570 & 571 LKK

UNITED STATES OF AMERICA

v

RYLANDER & CO., REALTORS, INC.
AFFILIATED INVESTMENT & MORTGAGE CO., ET AL.,

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on February 11, 1980 I served a copy of the Attached ORDER TO SHOW CAUSE by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the United States Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptacle located in the Clerk's Office.

Served By Mail
RICHARD W. RYLANDER, SR.
Being served in person
by the US Marshal
3333 Watt Avenue, Suite 203
Sacramento, CA 95821

Served by Inter-Office Delivery
SOL ROBINSON, AUSA

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Crs. 80–44LKK

ORDER GRANTING PETITION TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT

and

CIVIL NO. S–79–570–LKK
CIVIL NO. S–79–571–LKK

UNITED STATES OF AMERICA, *Plaintiff,*

v.

RICHARD W. (DICK) RYLANDER, SR., *Defendant*

On petition for order to show cause filed by the United States Attorney, and good cause appearing therefor as shown by the petition for order to show cause in re contempt filed therein;

IT IS HEREBY ORDERED that you, Richard W. (Dick) Rylander, Sr., appear before the Honorable Lawrence K. Karlton , United States District Judge for the Eastern District of California, United States Courthouse, 650 Capitol Mall, Sacramento, California, on April 15, 1980, at 9:30 a.m., and show cause why you should not be adjudged guilty of criminal and contempt of court and punished therefor.

IT IS FURTHER ORDERED that, at the above time and place, you show cause why you should not be adjudged in civil contempt of this Court's Order of January 15, 1980, requiring you to obey the IRS summonses attached to the Petition for Order to Show Cause and why you should not immediately comply with said Order by producing the records and documents of Rylander & Co. Realtors, Inc. and Affiliated Investments and Mortgage Co., as required by said summonses and ordered by this Court.

Dated: March 28, 1980

/s/ ______________________
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Cr. S-80-44-LKK
CIVIL NO. S-79-570-LKK
CIVIL NO. S-79-571-LKK

UNITED STATES OF AMERICA, *Plaintiff,*

v.

RICHARD W. (DICK) RYLANDER, SR., *Defendant*

FURTHER ORDER GRANTING PETITION TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT

On Petition for an Order to Show Cause filed by the United States Attorney, and good cause appearing therefore as shown by the Petition for an Order to Show Cause in re Contempt filed therein in this matter,

IT IS HEREBY ORDERED that you, Richard W. (Dick) Rylander, Sr. appear before the Honorable Lawrence K. Karlton, United States District Judge for the Eastern District of California, United States Courthouse, Courtroom number one, Second Floor 650 Capitol Mall, Sacramento, California, on May 27, 1980, at 9:30 a.m., and show cause why you should not be adjudged guilty of criminal contempt of court and punished therefore;

IT IS FURTHER ORDERED that at the above time and place to show cause why you should not be adjudged in civil contempt of this Court's Order of January 15, 1980, requiring you to obey the IRS summonses attached to the Petition for an Order to Show Cause, and why you should not immediately comply with said Order by producing the records and documents of Rylander and Company Realtors, Inc. and Affiliated Investments and Mortgage Company, doing business as AIM Real Estate Marketing and Counseling, Inc., as required by said summonses and Order by this Court.

Precedent to this Order, an Order was filed on March 28, 1980, for the defendant to show cause on April 15, 1980, at 9:30 a.m.; however, the Plaintiff was unable to perfect personal service of process or in the alternative constructive service of process.

IT IS FURTHER ORDERED that the Clerk of this Court publish and the Clerk of the Court cause to be served by certified mail upon the following parties or entities: Richard W. (Dick) Rylander, Sr. 3333 Watt Avenue, Suite 203, Sacramento, California; Rylander and Company Realtors, Inc., 3333 Watt Avenue Suite 203, Sacramento, California; Affiliated Investments and Mortgage Company, doing business as AIM Marketing and Counseling, Inc., 3333 Watt Avenue, Suite 203, Sacramento, California; and John T. Simon as the registered agent for AIM Real Estate Marketing and Counseling, Inc., 3333 Watt Avenue, Suite 203, Sacramento, California;

IT IS FURTHER ORDERED that the United States Marshal and/or his Deputies attempt to serve personally upon the above-entitled individuals and/or entities the processes of this Court.

/s/ ______________________

Lawrence K. Karlton
U.S. District Judge

DATED: April 21, 1980

CERTIFICATE OF SERVICE

Case No. cr.s–80–44–LKK
and
CASE NO. civ. s–79–570–LKK
CASE NO. civ.s–79–571–LKK

UNITED STATES OF AMERICA, *Plaintiff*.

v.

RICHARD W. (DICK) RYLANDER, SR., *Defendant*.

I, the undersigned, hereby certify that I am an employee of the Office of the Clerk, U.S. District Court, Eastern District of California.

That on April 22, 1980 I served a copy of the attached FURTHER ORDER GRANTING PETITION TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT by placing said copy in a postage paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the United States Mail at Sacramento, California; or by placing said copy into an inter-office delivery receptacle located in the Clerk's Office.

Served by Mail

Richard W. (Dick) Rylander, Sr.
3333 Watt Avenue, Suite 203
Sacramento, CA 95821

RYLANDER AND COMPANY REALTORS, INC.
3333 Watt Avenue, Suite 203
Sacramento, CA 95321

AFFILIATED INVESTMENTS and
MORTGAGE COMPANY dba AIM MARKETING
and COUNSELING, INC.
3333 Watt Avenue, Suite 203
Sacramento, CA 95821

John T. Simon, Registered agent
for AIM Real Estate Marketing and Counseling, Inc.
3333 Watt Avenue, Suite 203
Sacramento, CA 95821

Served by Inter-Office Delivery

Judge Karlton

John Gibbons, AUSA

US Marshal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CRIM. S–80–44 LKK
(Civil S–79–570)
(Civil S–79–571)

UNITED STATES OF AMERICA, *Plaintiff*,

v.

RICHARD W. (DICK) RYLANDER, SR. *Defendant*

ORDER

The defendant is charged with civil contempt, pursuant to 28 U.S.C. § 1651(a), for failure to comply with this Court's order of January 15, 1980, enforcing Internal Revenue Service administrative summonses. The defendant is also charged with criminal contempt pursuant to 18 U.S.C. § 401(3). This charge arises from the defendant's refusal to appear, despite notice, at judicial proceedings requiring him to show cause why he should not be held in contempt for failure to comply with the January 15, 1980, order.

The defendant has requested a jury trial on the issues of contempt, asserting that a right to a jury trial should exist in both the civil and criminal contempt contexts.

Due to the conditional nature of civil contempt confinement, as a matter of law a jury trial is not constitutionally required in such proceedings. *Shillitani* v. *United States*, 384 U.S. 364 (1966).

Whether a defendant is entitled to a jury trial in a criminal contempt proceeding is dependent upon the characterization of the contempt as "*petty*" or "serious." If it is petty no such right exists. To determine the seriousness of the offense the court must look to the maximum penalty prescribed by law or, if none is provided, the penalty actually imposed. *Muniz* v. *Hoffman*, 422 U.S. 454 (1975). Where a sentence of up to six months imprisonment and/or at least $500 is imposed the criminal contempt is deemed *petty* and a jury trial is not required. *Muniz* v. *Hoffman*, *supra*. at

476–77. If the defendant in the present case were found guilty of criminal contempt the sentence imposed would *not* exceed the limits noted above.

Finally, this case falls within the exception to 18 U.S.C. § 3691. *See, Frank* v. *United States*, 395 U.S. 147, 149 n.1 (1969). Accordingly, it is ordered that the defendant's request for a jury trial is denied.

IT IS SO ORDERED.

DATED: September 24, 1980

Lawrence K. Karlton
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Cr. S–80–44–LKK
(Civ. S–79–570–LKK)
(Civ. S–79–571–LKK)

UNITED STATES OF AMERICA, *Plaintiff,*

v.

RICHARD W. (DICK) RYLANDER, *Defendant.*

At a stated term of the United States District Court for the Eastern District of California, held at the Courtroom thereof, in the City of Sacramento, on October 8, 1980.

PRESENT: The Honorable LAWRENCE K. KARLTON, U.S. District Judge

The above-captioned matter came on for court trial. The Court now finds as follows:

1. Relative to the charges of criminal contempt the defendant is guilty of failure to produce documents pursuant to the order of this Court enforcing the administrative summons;

2. The defendant is not guilty of avoiding process to appear at the February 22, 1980, hearing;

3. The defendant is guilty of failing to appear at the March 24, 1980, hearing.

The Court now orders a pre-sentence report for those matters upon which the defendant was found guilty. As previously ordered, punishment for guilt as to those charges will be limited to punishment applicable to petty offenses (i.e. not more than six months or $500.00 on each count).

The Court further orders judgment and sentencing set for November 18, 1980, at 9:30 a.m.

Further, the Court finds the defendant, Richard W. (Dick) Rylander, guilty of civil contempt and orders him remanded to the custody of the Attorney General unless and until he purges himself of the civil contempt charge by either:

1. Complying with the Court Order to produce the documents; or

2. Testifies why he cannot produce the documents.

Upon the defendant's indicating his willingness to testify as to why he cannot produce the documents, the Order remanding the defendant to the custody of the Attorney General is vacated. Upon the defendant's indication of his desire to have the Federal Defender appointed to represent the defendant concerning possible Fifth Amendment claims, the Federal Defender is conditionally appointed pursuant to the order heretofore issued by the Court concerning appointment of counsel.

A hearing on the purging motion is now continued to October 9, 1980, at 10:00 a.m. Defendant is ordered to be personally present at that time, and is permitted to remain on bail.

I HEREBY CERTIFY that the foregoing is a true and correct statement of an order made in the above entitled case.

J. R. Grindsiaif, *Clerk*
By: Sharon Jaggard

Dated: October 8, 1980
cc hand delivered to:
AUSA S. Robinson
Mr. Richard W. (Dick) Rylander

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

OCTOBER 8, 1980

Case No. Cir. S–80–44–LKK
(Civ S–79–579–LKK)
(Civ S–79–571–LKK)

UNITED STATES, *Petitioner*,

v.

RICHARD W. (DICK) RYLANDER, SR. *Defendant.*

BEFORE: Lawrence K. Karlton
TITLE: Deputy Clerk: S. Jaggard
Reporter: Dick Fong

CRIMINAL MINUTES
PROCEEDINGS

Court Trial re: Criminal & civil charges in the above cases.

Deft. made objection to this Courts jurisdiction.

Gov't. made opening statements.

Witnesses sworn and testified, exhibits marked and rec'd into evidence (see Court witness and exhibit list).

Federal Defender, Carl Larson appointed to represent witness and Rylander concerning possible 5th Amendment rights during his testimony—

Gov't. made closing statements.

Court ruled as set forth on the attached formal minutes.

Judgment as to criminal matters set for 11-18-80 at 9:30 a.m.

Criminal aspect of trial concluded.

Hearing on the civil contempt (purging motion) set for 10-9-80 at 10:00 a.m.

Federal Defender to be appointed to represent the defendant concerning 5th Amendment claims as defendant desired to testify.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

OCTOBER 9, 1980

Cir. Case No. Cir. S–80–44–LKK
Civ. S–79–570–LKK
Civ S–79–571–LKK

UNITED STATES

v.

RICHARD W. (DICK) RYLANDER, SR.

CRIMINAL MINUTES
PROCEEDINGS

BEFORE: Lawrence K. Karlton
Attorneys AUSA Solomon Robinson
Deputy Clerk: S. Jaggard
Reporter: Dick Fong

PROCEEDINGS

Second day Court Trial on the civil contempt charge—

Federal Defender Carl Larson appearing as ordered but was excused due to conflict of interest. Court ordered a panel attorney be appointed.

Federal Defender Larson made motion for appointment of Joe Harbison as counsel—granted.

Mr. Harbison appointed to represent defendant on all matters re: to the civil contempt thru its disposition.

Hearing re: Civil Contempt (purging motion) continued to 10-23-80 at 1:30.

Government to prepare finding of fact and conclusions of law order before 10-23-80.

Court ordered that U.S. Probation Office not start the interview re: the pre-sentence report until after the 10-23-80 hearing.

[Transcript of Hearing, Monday, January 14, 1980 10:00 a.m.]

[3] THE CLERK: Your Honor, calling two cases out of order. Civil S79–570, United States of America versus Rylander and Company, and Civil S79–571, United States of America versus affiliated Investments.

* * * * *

THE COURT: All right. The reason I have done that is I did not want you to fill me in on your problem relative to service in this matter and given the state of the file.

MR. ROBINSON: First of all, we have not been served with any document on our filing on our Order to Show Cause.

THE COURT: Let me understand. You have not received any document filed by Mr. Rylander on both of the affidavits?

MR. ROBINSTON: No.

THE COURT: Then you are not prepared to discuss the matter. He denies he is an agent, or the president or otherwise associated with either of the corporations and he denies he was at the time.

MR. ROBINSON: Your Honor, we effectuated service on November 30th. That particular document gave Mr. Rylander ten days to any defenses or law in fact to our particular papers. [4] Nothing was filed.

THE COURT: According to Mr. Rylander, Mr. Rylander is here saying: I don't have anything to do with these corporations and you haven't served the corporations, Mr. Robinson. That's our problem. He says somebody came around and gave me these pieces of paper and mailed me pieces of paper and did other things. That's all very interesting, and I'm really fascinated by this lawsuit but I don't think they served the corporation because I don't have anything to do with the corporation.

Let's do this, Mr. Robinson, because I don't want to waste your time and mine. What I think I want to do is to call these documents to your attention, which I have now done. I know you are anxious to get on with the case and I am also, to be frank with you, and I just want to be sure I have jurisdiction to proceed.

* * * * *

[5] THE COURT: All I want is an offer of proof as to what all these folks would say. Do you need five minutes to put it together?

MR. ROBINSON: No, I have it.

THE COURT: All right.

MR. ROBINSON: My witness is looking at some of my documents.

THE COURT: I see. It makes it hard for you to look at them.

MR. ROBINSON: It's hard for me to look at them. We have two corporations involved.

Our offer of proof would be as follows: The Corporation entitled Rylander Company Realtors, Inc., was incorporated as a California corporation April 1, 1969. Its incorporating number is 566038.

The second item, the statement of certification with respect to that corporation has been furnished by the Secretary of State because we are informed by the Secretary of State's office that the corporation has been inactive for the last five years. So we could not get a statement of the officers of the corporation through the Secretary of State's office.

[6] The second item of proof is that Richard Rylander signed the document, the purchase agreement: that's June 2, 1975 purporting to sell all of the assets of Richard Rylander Company Realtors, Inc., to another corporation called Affiliated Investors Management Company. That document was signed by Richard Rylander. We have a copy of the document signed by Richard Rylander as president dated June 2, 1975.

The third item of proof, a checking account at the Bank of California, account number 02901278–8 was opened by a person called Richard Rylander. Checks were written on that account by Richard Rylander as president of Rylander and Company Realtors, Inc. We have copies of those checks. Those checks for the record are dated March 31, 1975, and March 4, 1975.

Further we have copies of Federal tax returns filed January 31, 1974, on behalf of a corporation entitled Rylander and Company Realtors, Inc., signed by Dick Rylander, Sr., as president of that company. Those are tax returns for 2—they are really corporate fiscal years, the fiscal years 1972 and 1973, those returns were filed January 31, 1974.

The addresses that appear on both the tax returns, the purchase agreement, on the signature card of the Bank of California all are at 3333 Watt Avenue, Sacramento, California, which is the address at which Mr. Rylander was served in this proceeding.

Fifth, we have the declarations of a Mr. Hensley. Mr. Hensley is—his title is Deputy Commander, licensing [7] examinations for the Department of Real Estate, State of California. Mr. Hensley in his declaration has indicated that Rylander and Company Realtors, Inc., was licensed in 1973 as a real estate broker through a William Rylander as chief officer. The address of that licensed corporation, again, is 3333 Watt Avenue in Sacramento, California.

Sixth, Mr. Hensley in his declaration, which we are prepared to file if that were appropriate, has indicated that license was cancelled by Richard Rylander as officer of Rylander and Company Realtors, Inc., October 1, 1974.

The final is the record of the Secretary of State's Office which indicates that the corporation, Rylander and Company Realtors Inc. is viewed by them as an inactive corporation. The Franchise Tax Board suspended—I assume for the purpose of failing to pay the annual taxes. They suspended the license of the corporation October 1, 1973. The Secretary of State's Office does not contain—and this will be the final testimony of Miss VanDenBerg—any record indicating that the corporation has been dissolved voluntarily or involuntarily since this incorporation here in California even though our records don't indicate any activity since 1975. I think there is a presumption that there is still—

THE COURT: All right.

MR. ROBINSON: —an existing legal entity.

THE COURT: All right. Miss VanDenBerg, may I ask you [8] to come forward, ma'am. Come right up here and stand and be sworn.

Joan VanDenBerg sworn.

EXAMINATION BY THE COURT:

Q. Would you state your name, please?

A. My name is Joan VanDenBerg.

THE COURT: What is your occupation?

A. I'm a special agent with the Internal Revenue Service.

Q. Did you hear the offer of proof made by Mr. Robinson?

A. Yes, I did.

Q. Except to the matter set forth in the affidavit, if you were called upon, would you testify to the truth of each of those matters?

A. There is one correction, sir. That is to the bank account that is at the Security Pacific Bank.

Q. Other than that, is it all correct?

A. Yes, it is.

Q. THE COURT: Thank you very much. Will you file the affidavit that you were talking about?

MR. ROBINSON: Mr. Hensley.

THE COURT: All right, yes, Mr. Hensley. All right, let's take up the—

MR. ROBINSON: The offer of proof with respect to the entity titled Affiliated Investment Mortgage Company, which for purposes of record we will call AIM, is as follows: July 18, 1972, [9] the Articles of Incorporation were issued by the Secretary of State of California incorporating a company called Affiliated Investment and Mortgage Company.

Richard W. Rylander was listed first as one of three directors. His address was stated to be 3333 Watt Avenue in Sacramento.

Secondly, the Federal tax returns for the years 1972 and 1973 were filed June 14, 1974, for AIM. They were signed by Richard W. Rylander, president. He gave the same Watt Avenue address.

The third item followed with the County of Sacramento, a fictitious name statement, April 1, 1975, and he listed as a fictitious name of Affiliated Investment and Mortgage Company the following name: AIM Real Estate Marketing and Counseling Service. It was signed by Dick Rylander, Sr., president; giving the same 3333 Watt Avenue address.

Fourth, on April 4, 1975, AIM together with its dba applied for a real estate corporation license with the California State Real Estate Board. Richard W. Rylander, president, signed the application and gave the social security number 562 38 0046.

We have the declaration of a Mr. Hensley, the same Mr. Hensley that I spoke to earlier, your Honor. The license for which AIM applied was indeed issued April 1, 1975.

Fifth, we have the signature cards of an account opened by AIM together with his dba in the Bank of California, Dick Rylander, Sr., is the only authorized signatore. He is [10] listed as president. The account was opened April 11, 1975.

The next offer of proof is that August 18, 1975, a change in name of the real estate broker records of the corporation Affiliated Investment and Mortgage Company show a change of the officer's personal name from Richard W. Rylander to Dick Rylander. That's important because some of the documents were signed by Richard Rylander and Dick Rylander, so the record will reflect they are the same person. He filed that with the Department of Real Estate.

We have a statement of the officer from the Secretary of State of California filed May 23, 1977, and that shows Dick Rylander, Sr., as president and agent for service of process.

THE COURT: I really think that is sufficient at this point, Mr. Robinson

MR. ROBINSON: If your Honor is satisfied, fine. But the last statement I made is that we again check with the Secretary of State, and this corporation again does not have any filing of showing it has been dissolved or terminated as a legal entity, and I think that would end it.

THE COURT: If you were called upon, would you testify as to each matter that Mr. Robinson offered as a matter of proof within your personal information because you went and checked the records?

MISS VANDENBERG: Yes I would, your Honor.

[11] THE COURT: Again, will you file Mr. Hensley's declaration.

MR. ROBINSON: Yes I will.

THE COURT: The Court is satisfied there is sufficient evidence that Mr. Rylander was president of the corporation at all times of pertinence tiered to the service upon the corporation, and accordingly we have taken care of that problem and you may retire if you like.

Let's turn to the next problem and there is only one problem in my mind, Mr. Robinson, and perhaps we can deal with this rapidly as possible and get it over with. I do have a problem with the standard.

Are you prepared to discuss this matter about whether or not in fact the Internal Revenue Service is not in possession of certain other matters that you seek, and I particularly address myself to the W2s, the 1099, form 941, and the form 940.

MR. ROBINSON: Again, I think I would get the testimony of the agent on that matter, your Honor. It's my understanding that we do not have that information.

THE COURT: How could it possibly be? I mean these are all matters that had to be filed as you went along and they are not under—well, perhaps we better—

MR. ROBINSON: There may have been no filing.

THE COURT: I'm sorry, ma'am. I didn't realize there was more to this. Why don't you give me an offer of proof as to this, Mr. Robinson?

* * * * *

[14] THE COURT: All right. That will be the order. The Court finds there has been sufficient service and there is a sufficient showing and will now issue an order requiring the named parties to testify and produce the records demanded in the IRS summons served on January 4, 1979; that the date for such appearances shall be twenty days from now.

* * * * *

[15] MR. ROBINSON: Your Honor, should the record reflect Mr. Rylander is not present?

THE COURT: I suppose we ought to say that.

MR. ROBINSON: He is not here in person nor through counsel.

THE COURT: The record does reflect.

* * * * *

Transcript of Proceedings, Tuesday, May 27, 1980, 9:30 a.m.

[19] THE COURT: Are we approaching the culmination of this matter, Mr. Robinson?

MR. ROBINSON: Your Honor, that's up to you.

THE COURT: Where are we now? The record will reflect the United States is present and represented by Mr. Robinson, and to everyone's surprise Mr. Rylander is not here.

MR. ROBINSON: Your Honor, for the record I would like to recite the efforts we made since your last order to secure his presence.

THE COURT: You may proceed, sir. I think the record speaks for itself, but just to get it clear, go ahead.

MR. ROBINSON: The first with respect to personal service on Mr. Rylander, in that a return of service or the return of no service, by the clerk's office today, one of the supervisors, Mr. Steves, indicates that at least the six attempts were made by the marshal's office to personally serve Mr. Rylander. The last which was on May 21, 1980.

None of those attempts were successful [20] for the reasons noted in the return of service.

THE COURT: All of which are very indicative of an evasion of service.

MR. ROBINSON: I think so, your Honor. In addition, in accordance with the Court's most recent order regarding constructive service, the United States through the Marshal's office published in the Daily Recorder, a newspaper of general circulation in the City of Sacramento, the order of the Court relating to show causes dealing with both criminal and civil contempt; that entire order appeared in the issues of April 28, 30th; May 5th, 7th, 12th, 14th, 19th, and 21st.

An affidavit from the publisher of the Daily Recorder has also been made of record of the United States.

Finally, I am informed by the post office that again pursuant to our order certified—pardon me. Through the use of certified mail, copies of the order to show cause were mailed to the address of Mr. Rylander. The only address we have is 3333 Watt Avenue, Suite 302, here in Sacramento. Three of those were returned as being not accepted. The fourth without explanation. The card has not come back. We don't know whether there is a delay in the mail or what. We don't know about the fourth.

THE COURT: The Court is really satisfied (1) that constructive service has been accomplished, (2) that Mr. Rylander is avoiding service, and the Court is prepared to do whatever is necessary to insure Mr. Rylander's presence.

[21] We'll, if you desire, now issue a bench warrant whatever is appropriate in the next step to get the proceedings on the road.

MR. ROBINSON: Well, your Honor, Rule 42 of the Rules of Criminal Procedure dealing with criminal contempt do authorize this Court to issue an arrest warrant or bench warrant.

THE COURT: That will be the order.

* * * * *

[Transcript of Hearing, October 8, 1980, 2:00 p.m.]

[181] THE WITNESS: Frank Schackner, S-c-h-a-c-k-n-e-r.

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Mr. Schackner, are you employed, sir?

A Employed with the Internal Revenue Service at 515 L Street.

Q. What is your position or title?

A. Revenue Officer.

* * * * *

Q Mr. Schackner, as a revenue officer of the IRS, have you had an occasion to interview or confer with the defendant?

A Yes, I have.

Q During what period did that conference or interviewing take place?

A Initially in 1975, September 1975.

Q. What was its purpose?

A It was regarding Rylander and Company, Incorporated; and it was regarding the collection of some delinquent payroll taxes [182] incurred by that corporation.

Q Where did you interview the defendant in September of 1975?

A In the Watt Avenue location on Watt Avenue. The exact address kind of escapes me.

THE COURT: Was this the office of Rylander and Company?

THE WITNESS: Yes, sir.

Q. BY MR. ROBINSON: It is not your office?

A. No, not at my office.

Q. Now, Mr. Schackner, at that interview, did you ask the defendant what his relationship to Rylander and Company Realtors, Inc., was?

A. Yes, sir.

Q. What did he reply to that inquiry?

A He was the president of the corporation.

Q. Do you know the approximate date from memory that the interview took place in September?

A. I do have a document that gives that date, if I could look at it?

* * * * *

[183] Q. On what date in September of 1975 did the interview take place?

A. September 18th.

Q. Now was it Mr. Rylander's statements to you that—on that date he was president of Rylander and Realty, Inc.?

A. Yes. It was his statement.

Q. Did he indicate how long he had been president?

[184] A. He indicated from '69—1969 to the present, which was that date. That would be approximately 1969. He wasn't certain of the exact date of incorporation.

Q. Did you ask Mr. Rylander whether that company, Rylander and Company Realtors, Inc., maintained books and records?

A. Yes, I did.

Q. What did he tell you?

A. He told me yes.

Q. Did he indicate what kinds of records he kept or the company kept?

A. Not specifically. That question wasn't asked specifically.

Q Did you inquire of him as to the location of those books and records?

A. Yes, I did.

Q. What did he reply?

A. Apex Bookkeeping.

Q. Was an address given?

A. Excuse me. 1921 Florin Road, Sacramento.

Q. Now, Mr. Schackner, in connection with your inquiry into whether or not the company have paid payroll taxes, did Mr. Rylander offer you any documentary material relating to his relationship to the company or relating to inquiry under investigation?

A. He gave me no documents relating to the corporation. I had to go to the bookkeeping service to secure any documents needed at [185] that time.

Q. He gave you no documents?

A. No, no special documents. Excuse me. He did give me documents pertaining to some assets of the corporation showing that these assets had been transferred to another corporation.

Q. When was that?

A. That was on the same day that he provided me with this statement.

THE COURT: In other words, the same day as the interview where his assets had been transferred; is that correct?

THE WITNESS: I can't say—he gave me a statement indicating that they had been transferred at that time.

THE COURT: I see.

Q. BY MR. ROBINSON: Sir, would you identify that document for the record?

A. Yes. This is a copy of a document provided me. It may be the original copy. I don't know.

Q. Does it have a title or some other identifying feature on it?

A It's headed AIM Real Estate Marketing and Counselling. And it's titled purchase agreement office furniture and miscellaneous items.

Q. Is it dated?

A. It is dated June 2, 1975.

* * * * *

[188] MR. ROBINSON: Mr. George Ogihara.

GEORGE OGIHARA,

called as a witness on behalf of the Government, having been sworn to tell the truth and nothing but the truth testified as follows:

THE CLERK: Please state your name for the record and spell your last name?

THE WITNESS: George Ogihara, O-g-i-h-a-r-a.

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Mr. Ogihara, sir, where are you employed?

A. I am employed at 801 I Street, Sacramento, California.

Q. For what company, agency, or business?

A. Internal Revenue Service, Field Examination.

Q. What is your present position?

A. My position is revenue agent.

Q. How long have you been with the Internal Revenue Service?

A. I have been in service since July 1971.

[189] Q. Now who is your supervisor at the IRS?

A. My supervisor's name is J. Meyer.

Q. I take it you are not in the criminal investigation division?

A. No, sir, I'm not.

* * * * *

Q. In connection with this function of assisting the special agent, did you meet with the defendant on February 4, 1980?

A. Yes, sir.

Q. Where did that meeting take place?

A. That meeting took place at Room 292, 801 I Street, Sacramento, California.

Q. Other than you and the defendant, who else was present?

A. There was Mrs. Van Den Berg, the special agent in charge there, and Scott O'Brien, who is the transcriberreporter, and Mr. Al—his name is Freidenberg, who was acting supervisor at [190] the time.

Q. What was the purpose of your meeting with Mr. Rylander?

A. My purpose being there was to witness the proceeding.

Q. Mr. Rylander did appear?

A. Yes, he did.

Q. Did he produce any books, records, documents relating to corporations?

A. No, sir, he did not.

Q. What did he do, Mr. Ogihara?

A. When I entered the room 292, Mr. Rylander was there already and he had a tape recorder and a prepared statement.

Q. Did he read a prepared statement?

A. Yes, sir, he did.

Q. While you were there?

A. Yes.

Q. Do you recall that statement?

A. Not verbatim, but, yes, I do indeed.

Q. In this respect you recall what Mr. Rylander said, if anything, to the question whether or not he had the books and records that he was supposed to produce in connection with the court order?

A. He stated that he did not have a record.

Q. Did he offer any further explanation?

A. No, sir, he did not.

* * * * *

[262] THE COURT: *** As to the matter of civil contempt, the defendant is presently remanded to the custody of the marshal to be incarcerated until such time as he purges himself of that contempt. The defendant may purge himself of that contempt in one of two ways. He may indicate to the Court his willingness to comply with the Court

order relating to the production of the documents [263] in question or he may forthrightly come forward to this Court and in fact demonstrate that he is incapable of doing so, and at any time that he indicates to a marshal or to the sheriff's office and then to the marshal that he desires to come before the Court, he will be brought before the Court.

Before you are remanded, Mr. Rylander, and if you think I take pleasure in doing this, you are sadly mistaken, sir. But I will not permit the processes of this court to be frustrated and whatever I think of the law I will do my oath. I ask you, sir, do you desire to purge yourself of contempt by producing the documents which have been subpoenaed?

MR. RYLANDER: Your Honor, I am still in special appearance. I do not know how on this God's earth I can produce what you're asking.

THE COURT: Sir, are you prepared to be sworn and tell me why you cannot produce them?

MR. RYLANDER: I cannot produce them because I don't have them.

THE COURT: I ask you again. Are you prepared to state under oath conditions why you do not have them?

MR. RYLANDER: I am prepared.

THE COURT: Thank you, sir. Will you come forward and be sworn.

MR. ROBINSON: Your Honor, this is a continuation of the—

[264] THE COURT: No. I am giving the defendant an opportunity to purge himself.

MR. ROBINSON: And we will have no opportunity to cross-examine?

THE COURT: I didn't say that, sir.

MR. ROBINSON: Should he be forewarned, your Honor, before he takes the stand that he may be cross-examined about things which—

THE COURT: Mr. Robinson, I have found him guilty of criminal contempt for failing to produce those records. The sole matter that I will permit cross-examination about is whether he can presently do so and why he cannot.

MR. ROBINSON: Very well, your Honor.

THE COURT: But now you have convinced me maybe this is going to be a problem. We are going to take another brief recess, sir, and I'll get the Federal Defender back up here.

Will you accept the services of a Federal Defender for purposes of asserting this amendment? Mr. Larson or whichever one I can find for you?

MR. RYLANDER: Yes, I will do so.

THE COURT: We will stand in recess until we can get a Federal Defender up here.

* * * * *

[Transcript of Proceedings, Wednesday, October 9, 1980, 10:00 a.m.]

[273] DEFENDANT RYLANDER: Your Honor, I filed on oath this morning with the Court. I don't know if you have a copy.

THE COURT: No. I'm sure I do not, sir.

[274] DEFENDANT RYLANDER: If I may.

THE COURT: I will review this matter and whatever pertinence it has. I have not read it. I have just read the—have you handed a copy to the United States?

DEFENDANT RYLANDER: Yes, I did.

THE COURT: Mr. Robinson, you are ordered to discontinue reading it.

Mr. Rylander, I don't know what is in this. I don't want to read it and I don't want it—you filed it already. I suppose that constitutes a waiver of the Fifth Amendment in any event. The whole problem has just gotten up and gone away.

DEFENDANT RYLANDER: Well, your Honor, I don't waive any of my Fifth Amendment rights.

THE COURT: Sir, I don't know what's in this. All right. I have not read it. As soon as I saw what the caption was, I stopped reading it. But I am going to tell you that if there are factual statements in there, you may well have done so. Whether you intended to or not—

DEFENDANT RYLANDER: I am simply stating under oath that I have no records.

THE COURT: I think that probably is a waiver in any event as to all facts relating thereto.

Well, that happens when a man represents himself.

DEFENDANT RYLANDER: As I stated yesterday, your Honor—

[275] THE COURT: Mr. Rylander, you have been silent all through the trial when it was very unwise to be silent. You want to talk now when it is probably very unwise for you to talk. What was done is done.

Would you get counsel here at 1:30 this afternoon? And I don't even know whether he has a function anymore, to be candid with you, Mr. Larson. I don't think my not reading, or Mr. Robinson not reading it is of any consequences. It has been filed in the court. So be it.

MR. LARSON: Thank you.

THE COURT: Mr. Rylander, you are ordered to return to this court at 1:30.

* * * * *

[Transcript of Proceedings, Wednesday, October 9, 1980 1:30 p.m.]

[276] THE CLERK: Criminal S–80–44, United States versus Richard W. (Dick) Rylander, Sr.

MR. ROBINSON: Solomon Robinson on behalf of the United States.

MR. LARSON: Carl Larson, Assistant Public Defender.

Your Honor, at this time I would move the Court to appoint Mr. Joe Harbison, Esquire, a member of the panel of the Eastern District, to represent Mr. Dick Rylander.

* * * * *

[277] THE COURT:

* * *

Mr. Habison, let me tell you what our problem is and it is obviously going to take you a little time to orient yourself although your services to the defendant will be relatively narrow and he may have narrowed them even more this morning.

Mr. Rylander, in a series of events which are not pertinent to why you are here today, represented himself as pro se under a petition by the United States for both civil and three counts of criminal contempt.

Yesterday the Court found Mr. Rylander guilty of one count of civil contempt and two of the three counts of criminal contempt. As I am sure you are aware when civil contempt is found, the defendant holds the keys to the jail in his own pocket.

[278] The Court remanded Mr. Rylander under an order which said that he would come forward and produce those certain documents which is the subject of his failure to produce being the subject of the civil contempt or he would testify under oath as to why he could not do so.

When the Court remanded Mr. Rylander, I inquired as to whether he desired to purge himself. And he indicated that he was prepared to testify that he had no such documents. He came forward and was sworn and the United States Attorney, Rm. Robinson, pursuant to his duty and just as a plain good lawyer said: Look, Judge, we're going to cross-examine him on these matters. And I said: Yes, of course you are. And we have to be candid there may well be criminal proceedings ultimately against Mr. Rylander under the Internal Revenue Code because all of this arises because of the Internal Revenue Code and, therefore, there is a problem about his Fifth Amendment rights.

I then inquired of Mr. Rylander whether he desired counsel for the purposes of aiding him in determining the propriety of the question and whether he desired to assert Fifth Amendment privileges as to the questions which are asked.

Are you with me so far?

MR. HARBISON: Yes.

THE COURT: He indicated he desired to do so. I then [279] vacated the order remanding him to the custody of the marshal so we could proceed.

Your function, insofar as this Court is concerned, is solely related to the question of the purge of contempt—

MR. HARBISON: The civil contempt?

THE COURT: —of the civil contempt under the standards that the Court has pronounced.

If you and Mr. Rylander make some other kind of arrangements, that is not a matter of concern to the Court.

Do you follow what I am saying?

MR. HARBISON: Yes. I understand the alternates, either he complies with the Court order to produce or testify he cannot. Apparently he filed something this morning which was taken out of my hands already.

THE COURT: That is part of the problem.

Mr. Rylander this morning took it upon himself—also he was still his own attorney and there was nothing improper about it; however sensible it might have been to file an affidavit. I have upon consideration this morning recognizing that it is now a public document, initially refused to read it and in some thoughtless way I was hoping that I might preserve to Mr. Rylander whatever rights he would have. Then it occurred to me that he filed it as a public document and it was a public document and whether I read it or not made no difference at all. I then proceeded to [280] read it and I have read it. I think it probably is sufficiently limited to the issues that he would have to restify to in any event in order to purge himself, and I am not really quite clear as to whether it does do damage to any Fifth Amendment rights he might have beyond the narrow question although it is not such a narrow question. Let's face it.

In any event, that is a matter I will worry about if and when it becomes pertinent at that point of the hearing.

Given that status, counsel, I am perfectly willing to provide you with whatever reasonable continuance you need and to permit Mr. Rylander to remain on his previously posted bail.

It does seem to me that the question is fairly narrow and extensive research would not be required, but M want to give you a reasonable opportunity to do whatever research you think is appropriate and, of course, consult with your client as to how he wishes to proceed under your guidance and advisement.

I would assume that for the hearing that we will eventually have it will go by your direct examination and the United States' cross-examination but—

MR. HARBISON: With regard to the records?

THE COURT: Yes. With regard to the two issues which the Court believes are the only two matters that are presently pending before it.

[281] MR. HARBISON: I would like to ask the Court this, for my own clarification, is the Court ruling this affidavit that has already been filed is not sufficient to purge him of the civil contempt?

THE COURT: I make no such judgment. If you are satisfied to rely on the affidavit, we can dispense with direct examination and take Mr. Rylander to the stand and permit the government to cross-examine him. That will be a judgment that you will want to make on your own.

MR. HARBISON: Whether I direct or not, apparently they are going to have the opportunity to cross and this document is of file.

THE COURT: Of Course. I mean he did not insulate himself from cross-examination by filing an affidavit. That may be his thought processes as to why he filed that affidavit.

* * * * *

[Transcript of Proceedings, Thursday, October 23, 1980, 1:30 p.m.]

[323] RICHARD W. RYLANDER,

called as a witness in his own bhealf, after having been sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: Please state your name for the record, and spell your last name.

THE WITNESS: Yes. My name is Richard William Rylander, R-y-l-a-n-d-e-r.

EXAMINATION BY THE COURT

Q. Mr. Rylander, you have filed an affidavit in which you say that you do not have the records that are the subject of this action; is that true, sir?

A. That is correct, your Honor.

Q. Where are the records?

A. I respectfully decline to answer on the advice of counsel and assert my Fifth Amendment.

THE COURT: Thank you, sir, I don't have to go beyond [324] that, do I?

MR. HARBISON: I have no questions, your Honor.

THE COURT: I am not going to direct him to answer because I don't know whether I can, sir.

MR. HARBISON: I am going to object if you ask him any other questions. The sole purpose was to make your record.

THE COURT: What else needs to be done in your view to make the record, Mr. Robinson?

MR. ROBINSON: Your Honor, I move to strike, then, the affidavit on the grounds that I have not had a chance to cross-examine him about the contents of that affidavit.

THE COURT: That motion will be taken under submission. Now you are in a position to make the motion.

You may step down, Mr. Rylander.

State of California

Office of
March Fong Eu
Secretary of State
SACRAMENTO

I, MARCH FONG EU, Secretary of State of the State of California, the legal custodian of the corporate files and the officer authorized to use the Great Seal of this State, do hereby certify:

That I am familiar with the provisions of the Corporations Code of this State which provide for the execution, acknowledgment and filing of Articles of Incorporation to effect incorporation of California corporations.

I further certify that on the 1st day of April, 1969, RYLANDER & CO., REALTORS INC., became incorporated under the laws of the State of California by filing its Articles of Incorporation in my office and that the annexed reproduction was prepared by and in my office from the record on file of which it purports to be a copy, and that it is full, true and correct, representing the only corporate document on file in this office for said corporation.

That according to the records of this office the Franchise Tax Board of the State of California notified this office that the corporate powers, rights and privileges of said corporation were suspended on October 1, 1975. The records in this office relating to said corporation are in the inactive files, reinstatement never having been effected.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California, this 25th day of September, 1980.

MARCH FONG EU
Secretary of State

By: Deputy

GOVERNMENT
EXHIBIT
1

ARTICLES OF INCORPORATION
OF
RYLANDER & CO., REALTORS INC.

One: The name of this Corporation is:

RYLANDER & CO., REALTORS INC.

Two: The purposes for which this corporation is formed, the specific business in which the corporation is primarily to engage being set forth in the following paragraphs are:

(a) To engage in the primary businesses of a real estate broker, insurance broker and agent, and an escrow holder within the State of California.

(b) To supervise and manage all classes of properties, income bearing or otherwise, for other persons, corporations and associations; to act as agent, broker or attorney in fact, on a commission basis or otherwise, for any other person, corporation or association; to negotiate sales, leases, mortgages, deeds of trust and other encumbrances or properties of other persons, corporations and associations, real, personal and mixed wheresoever situated; and generally to maintain, conduct and carry on the business of real estate agent and broker.

(c) To purchase, acquire, own, hold, lease either as lessor or lessee, sell, exchange, subdivide, mortgage, deed in trust, plant, improve, cultivate, develop, construct, maintain, equip, operate, and generally deal in any and all lands, improved and unimproved, dwelling houses, apartment houses, hotels, boarding houses, business blocks, office buildings, manufacturing works and plants, and other buildings of any kind, and the products and avails thereof, and any and all other property of any and every kind or description, real, personal and mixed, wheresoever situated, including water and water rights.

(d) To act as agent in soliciting and receiving applications for all kinds of insurance; to collect premiums upon insurance; and to do such other business as may be delegated to insurance agents; and to conduct a general insurance agency and insurance brokerage business.

(e) To act as life agent in the transaction of life insurance and generally, to do and perform all acts or things necessary, suitable, convenient, or proper in maintaining, conducting and carrying on the business of life agent transacting life insurance.

(f) To acquire, by purchase or otherwise, the goodwill, business, property rights, franchises and assets of every kind, with or without undertaking, either wholly or in part, the liabilities of any person, firm, association or corporation; and to acquire any property or business as a going concern or otherwise (i) by purchase of the assets thereof wholly or in part, (ii) by acquisition of the shares or any part thereof, or (iii) in any other manner, and to pay for the same in cash or in shares or bonds or other evidences of indebtedenss of this corporation, or otherwise; to hold, maintain and operate or in any manner dispose of, the whole or any part of the goodwill, business, rights and property as acquired, and to conduct in any lawful manner the whole or any part of any business so acquired; and to exercise all the powers necessary or convenient in and about the management of such business.

(g) To take, purchase and otherwise acquire, own, hold, use, sell, assign, transfer, exchange, lease, mortgage, convey in trust, pledge, hypothecate, grant licenses and franchises in respect of and otherwise dispose of letters patent of the United States or any foreign country, patent rights, licenses, franchises, and privileges, inventions, improvements and processes copyrights, trademarks and trade names, and governmental, state, territorial, county and municipal grants and concessions of every character which this corporation may deem advantageous in the prosecution of its business or in the maintenance, operation, development or extension of its properties.

(h) To enter into, make, perform and carry out contracts of every kind for any lawful purpose within limit as to amount, with any person, firm, association or corporation, municipality, country, parish, state, territory, government or other municipal or governmental subdivision.

(i) To become a partner (either general or limited or both) and to enter into agreements of partnership, with one or more other persons or corporations, for the purpose of carrying on any business whatsoever which this corporation may deem proper or convenient in connection with any of the purposes herein set forth or otherwise, or which may be calculated, directly or indirectly, to promote the interests of this corporation or to enhance the value of its property or business.

(j) From time to time to apply for, purchase, acquire by assignment, transfer or otherwise, exercise, carry out and enjoy any benefit, right, privilege, prerogative or power conferred by, acquired under or granted by any statute, ordinance, order, license, power, authority, franchise, commission, right or privilege which any government or authority or governmental agency or corporation or other public body may be empowered to enact, make or grant, to pay for, aid in, and contribute toward carrying the same into effect and be appropriate any of this corporation's shares, bonds and/or assets and to defray the costs, charges and expenses thereof.

(k) To subscribe or cause to be subscribed for, and to take, purchase and otherwise acquire, own, held, use, sell, assign, transfer, exchange, distribute and otherwise dispose of, the whole or any part of the shares of the capital stock, bonds, coupons, mortgages, deeds of trust, debentures, securities, obligations, evidences of indebtedness, notes, goodwill, rights, assets and property of any kind, or any part thereof, of any other corporation or corporations, association or associations, firm or firms, or person or persons, together with shares, rights, units or interest in, or in respect of, any trust estate, now or hereafter existing, and whether created by the laws of the State of California or of any other state, territory or country; and to operate, manage and control such properties, or any of them, either in the name of such other corporation or corporations or in the name of this corporation, and while the owners of any of said shares of capital stock, to exercise all the rights, powers and privileges of ownership of every kind and description, including the right to vote thereon, with power to designate some person or persons for that purpose from time to time, and to the same extent as natural persons might or could do.

(l) To promote or to aid in any manner, financially or otherwise, any person, firm, corporation or association at which any shares or stock, bonds, notes, debentures or other securities or evidences of indebtedness are held directly or indirectly by this corporation; and for this purpose to guarantee the contracts, dividends, shares, bonds, debentures, notes and other obligations of such other persons, firms, corporations or associations; and to do any other acts or things designed to protect, preserve, improve or enhance the value of such shares, bonds, notes, debentures or other securities or evidences of indebtedness.

(m) To borrow and lend money, but nothing herein contained shall be construed as authorizing the business of banking, or as including the business purposes of a commercial bank, savings bank or trust company.

(n) To issue bonds, notes, debentures or other obligations of this corporation from time to time for any of the objects or purposes of this corporation, and to secure the same by mortgage, deed of trust, pledge or otherwise, or to issue the same unsecured; to purchase or otherwise acquire its own bonds, debentures or other evidences of its indebtedness or obligations; to purchase, hold, sell and transfer the shares of its own capital stock to the extent and in the manner provided by the laws of the State of California as the same are now in force or may be hereafter amended.

(o) To purchase, acquire, take, hold, own, use and enjoy, and to sell, lease, transfer, pledge, mortgage, convey, grant, assign or otherwise dispose of, and generally to invest, trade, deal in and with oil royalties, mineral rights of all kinds, mineral bearing lands and hydrocarbon products of all kinds, oil, gas and mineral leases, and all rights and interests herein, and in general products of the earth and deposits, both subsoil and surface, of every nature and description.

(p) To carry on any business whatsoever, either as principal or as agent or both as a partnership, which this corporation may deem proper or convenient in connection with any of the foregoing purposes or otherwise, or which may be calculated directly or indirectly to promote the business; to conduct its business in this state.

(q) To act and function as an escrow holder or agent in connection with any of the foregoing purposes or otherwise.

(r) To have and to exercise all the powers conferred by the laws of California upon corporations formed under the laws pursuant to and under which this corporation is formed, as such laws are now in effect or may at any time hereafter be amended.

The foregoing statement of purposes shall be construed as a statement of both purposes and powers, and the purposes and powers stated in such clause shall, except where otherwise expressed, be in nowise limited or restricted by reference to or inference from the terms or provisions of any other clause, but shall be regarded as independent purposes and powers.

Three: The country in the State of California where the principal office for the transaction of the business of this corporation is to be located in Sacramento County.

Four: This corporation is authorized to issue only one class of shares of stock; the total number of said shares shall be One Hundred Thousand (100,000); the aggregate par value of all said shares shall be One Million Dollars (31,000,000,00); and the par value of each of said shares shall be Ten Dollars (310.00).

Five: No distinction shall exist between the shares of the corporation or the holders thereof.

Six: (a) The number of directors of this corporation shall not be less than five (5) nor more than eight (8). The exact number of directors shall be fixed from time to time, within the limits specified in these articles of incorporation, or a controlling by-law, by a by-law or amendment thereof duly adopted by the shareholders or by the Board of Directors.

(b) The names and addresses of the persons who are appointed to act as the first directors of this corporation are:

Name	Addresses
Richard W. Rylander	6233 Fair Oaks Boulevard Carmichael, California 95608
George W. Hull	4084 Hixon Circle Sacramento, California 95841
Earlene Zvalo	5553 Linda Lane Carmichael, California 95608
Edna E. Jones	Plymouth Drive North Highlands, California 95660
Ida B. Zvalo	2951 Howe Avenue Sacramento, California 95821

In witness whereof, or the purposes of forming this corporation under the laws of the State of California, the undersigned, constituting the incorporators of the corporation, including the persons named herein above is the first directors of this corporation, have executed these Articles of Incorporation this March 28, 1967.

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

On this March 28, 1969, before me, Philip H. Shedd, Jr., a Notary Public in and for said County and State, personally appeared Richard W. Rylander, George R. Hull, Earlene Zvalo, Edna E. Jones and Ida B. Zvola, known to me to be the persons whose names are subscribed to the foregoing articles of incorporation, and acknowledged to me that they execute the same.

Witness my hand and official seal.

State of California

Office of
March Fong Eu
Secretary of State
SACRAMENTO

I, MARCH FONG EU, Secretary of State of the State of California, the legal custodian of the corporate files and the officer authorized to use the Great Seal of this State, do hereby certify:

That I am familiar with the provisions of the Corporations Code of this State which provide for the execution, acknowledgment and filing of Articles of Incorporation to effect incorporation of California corporations.

I further certify that on the 18th day of July, 1972, AFFILIATED INVESTMENTS & MORTGAGE CO., became incorporated under the laws of the State of California by filing its Articles of Incorporation in my office and that the annexed reproduction was prepared by and in my office from the record on file of which it purports to be a copy, and that it is full, true and correct, representing the only corporate document on file in this office for said corporation.

That according to the records of this office the Franchise Tax Board of the State of California notified this office that the corporate powers, rights and privileges of said corporation were suspended on May 1, 1974. That the corporation was revived on August 21, 1974. That the corporation was again suspended on May 3, 1976. That the corporation was revived on January 5, 1977. That the corporation was again suspended on May 1, 1978. Therefore, the records in this office relating to said corporation are in the inactive files, reinstatement never having been effected.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California, this date: September 25, 1980.

MARCH FONG EU
Secretary of State

By:
Deputy

GOVERNMENT
EXHIBIT
2

ARTICLES OF INCORPORATION
OF
AFFILIATED INVESTMENT & MORTGAGE CO.

FIRST: The name of the corporation is AFFILIATED INVESTMENT & MORTGAGE CO.

SECOND: The corporation's purposes are:

(a) Primarily to engage in the specific business of mortgage broker.

(b) To engage generally in the business of purchasing, warehousing mortgages and trust deeds, and acquiring and placing real estate loans.

(c) To engage in any business related or unrelated to those described in clauses (a) and (b) of this Article SECOND and from time to time authorized or approved by the Board of Directors of this corporation.

(d) To act as partner or as joint venturer or in any other legal capacity in any transaction.

(e) To do business anywhere in the world; and,

(f) To have and exercise any and all rights and powers from time to time granted to a corporation by law.

The above purpose clauses shall not be limited of reference to or inference from one another, but each such purpose clause shall be construed as a separate statement conferring independent purposes and powers upon the corporation.

THIRD: The County in the State of California where the principal office for the transaction of the business of the corporation is located is in the County of Sacramento.

FOURTH: (a) The number of directors of the corporation is three (3).

(b) The names and addresses of the persons who are appointed to act as first directors are:

RICHARD W. RYLANDER 3333 Watt Avenue
Sacramento, California

KELLY LAMBERTON 4036 Dexter Circle
North Highlands, California

MARION SMITH 3549 Mulholland
Sacramento, California

FIFTH: The total number of shares which the corporation is authorized to issue is 1,000,000 shares. The aggregate par value of said shares is $1,000,000.00, and the par value of each share is $1.00.

SIXTH: Each shareholder of this corporation shall be entitled to full pre-emptive or preferential rights, as such are defined by law, to subscribe for or purchase his proportional part of any shares which may be issued at any time by this corporation.

IN WITNESS WHEREOF the undersigned and above-named incorporators and first directors of this corporation have executed these Articles of Incorporation on July 10, 1972.

____
Richard W. Ryland

____
Kelly Lamberton

____
Marion Smith

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

On 18 July, 1972, before me, the undersigned, a Notary Public in and for the said County and State, personally appeared RICHARD W. RYLANDER, KELLY LAMBERTON, and MARION SMITH, known to me to be the persons whose names are subscribed to the Articles of Incorporation above, and acknowledged to me that they executed the same.

WITNESS my hand and seal the day and year first above written.

____
Notary Public, County of Sacramento
State of California

CERTIFICATE OF INCORPORATION

AIM REAL ESTATE and MARKETING AND COUNSELLING, INC.

FIRST. The name of this corporation is AIM REAL ESTATE MARKETING AND COUNSELLING, INC.

SECOND. Its registered office in the State of Delaware is to be located at 1300 Market Street in the City of Wilmington, County of New Castle. The registered agent in charge thereof is The Company Corporation at same as above.

THIRD. The nature of the business and, the objects and purposes proposed to be transacted, promoted and carried on, are to do any or all the things herein mentioned, as fully and to the same extent as natural persons might or could do, and in any part of the world, viz:

"The purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware."

FOURTH. The amount of the total authorized capital stock of this corporation is 1000 shares of no Par Value.

FIFTH. The name and mailing address of the incorporator is as follows:

NAME: Regina Cephas - ADDRESS: 1300 Market St., Wilmington, DE 19801

SIXTH. The powers of the incorporator are to terminate upon filing of the certificate of incorporation, and the name(s) and mailing address(es) of persons who are to serve as director(s) until the first annual meeting of stockholders or until their successors are elected and qualify are as follows:

Name and address of director(s)

Dick Rylander, Sr. 3333 Watt Ave., Sacramento, CA — Fill in name(s) and address(es)

SEVENTH. The Directors shall have power to make and to alter or amend the By-Laws; to fix the amount to be reserved as working capital, and to authorize and cause to be executed, mortgages and liens without limit as to the amount, upon the property and franchise of the Corporation.

With the consent in writing, and pursuant to a vote of the holders of a majority of the capital stock issued and outstanding, the Directors shall have the authority to dispose, in any manner, of the whole property of this corporation.

The By-Laws shall determine whether and to what extent the accounts and books of this corporation, or any of them shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account, or book or document of this Corporation, except as conferred by the law or the By-Laws, or by resolution of the stockholders.

The stockholders and directors shall have power to hold their meetings and keep the books, documents and papers of the Corporation outside of the State of Delaware, at such places as may be from time to time designated by the By-Laws or by resolution of the stockholders or directors, except as otherwise required by the laws of Delaware.

It is the intention that the objects, purposes and powers specified in the Third paragraph hereof shall, except where otherwise specified in said paragraph, be nowise limited or restricted by reference to or inference from the terms of any other clause or paragraph in this certificate of incorporation, but that the objects, purposes and powers specified in the Third paragraph and in each of the clauses or paragraphs of this charter shall be regarded as independent objects, purposes and powers.

I, THE UNDERSIGNED, for the purpose of forming a Corporation under the laws of the State of Delaware, do make, file and record this Certificate and do certify that the facts herein are true; and I have accordingly hereunto set my hand.

D AT: 10-7-77
[illegible] Delaware
ty of New Castle

Regina Cephas

GOVERNMENT EXHIBIT 5

State of DELAWARE

Office of SECRETARY OF STATE

I, Glenn C. Kenton *Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of* Certificate of Incorporation of the "AIM REAL ESTATE MARKETING AND COUNSELLING, INC.", as received and filed in this office the eighth day of December, A.D. 1977, at 9 o'clock A.M.

In Testimony Whereof, *I have hereunto set my hand and official seal at Dover this* twenty-first *day of* May *in the year of our Lord one thousand nine hundred and* seventy-nine.

Glenn C. Kenton

Glenn C. Kenton, Secretary of State

Assistant Secretary of State

FORM 171

State of California

OFFICE OF THE SECRETARY OF STATE

I, MARCH FONG EU, Secretary of State of the State of California, hereby certify:

That there is no record in this office of the filing of a Certificate of Dissolution, in accordance with Section 1905 of the Corporations Code of the State of California, by RYLANDER & CO., REALTORS INC., corporate number 566038.

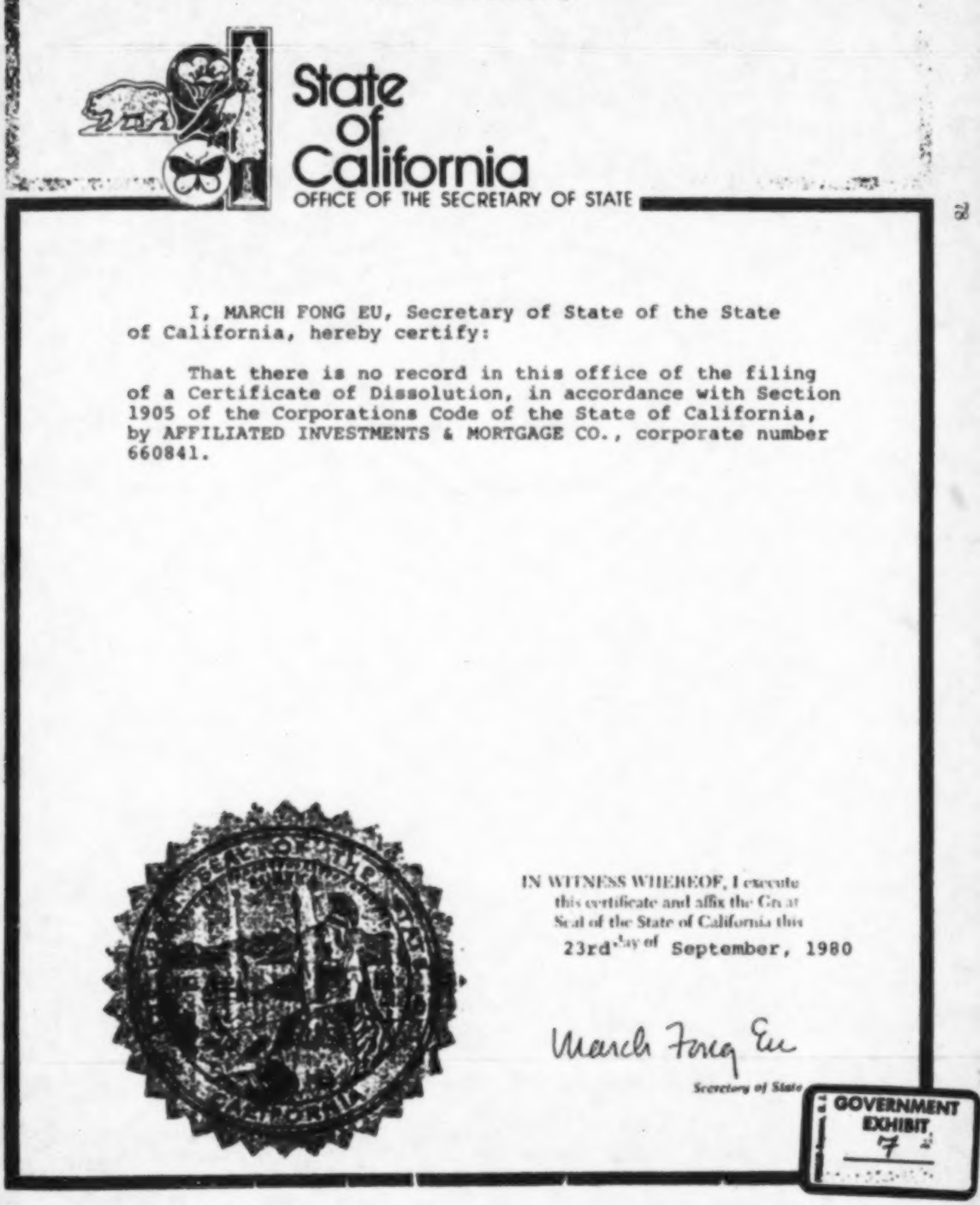
IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this 23rd day of September, 1980

March Fong Eu

Secretary of State

GOVERNMENT EXHIBIT 6

[Government Exhibit 7]



State of California
OFFICE OF THE SECRETARY OF STATE

I, MARCH FONG EU, Secretary of State of the State of California, hereby certify:

That there is no record in this office of the filing of a Certificate of Dissolution, in accordance with Section 1905 of the Corporations Code of the State of California, by AFFILIATED INVESTMENTS & MORTGAGE CO., corporate number 660841.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this 23rd day of September, 1980

March Fong Eu
Secretary of State

GOVERNMENT EXHIBIT 7

[GOVERNMENT EXHIBIT 18]

AIM Real Estate Marketing and Counseling, Inc.
1300 Market Street
Wilmington, Delaware 19801
A Delaware Corporation

Reply To:
Western Region Office
3333 Watt Avenue, Suite 202
Sacramento, California 95821
(916) 481-7930

December 28, 1978

Bank of California
2650 Watt Avenue
Sacramento, California 95321

Re: Account change

Gentlemen:

Please be advised that on this date, December 28, 1978, John T. Simon, as recorded in the State of Delaware, has acquired all the assets and interests of AIM Real Estate Marketing and Counselling, Inc., in the State of California.

A I M Real Estate Marketing and counselling, effective this date, is a sole proprietorship, a dba for John T. Simon, and not a corporation, foreign or domestic, in the State of California.

Mr. Dick Rylander, Sr. has full authority to act in all matters pertaining to your bank and A I M Real Estate Marketing and Counselling.

Please establish new account signature cards as follows:

Account 029–00604–1
John T. Simon, dba *A I M Real Estate Marketing and Counselling*, a sole proprietorship

Account 029–02493–6
John T. Simon/AIM Real Estate Marketing and Counselling, dba *Affiliated Escrow Service*, a sole proprietorship

The following name shall be authorized to transact the business of these Accounts (deposits, withdrawals, etc.) either singularily or in combination with each other:

John T. Simon, Dick Rylander, Sr., and/or Edwin I. Rylander

Thank you for your attention to this matter.

Sincerely

John T. Simon,
President

DICK RYLANDER, SR.,
V. President

Form 2039
(Rev. 3-77)

Summons

In the matter of the tax liability of
RICHARD W. RYLANDER, SR.
3333 Watt Avenue, Suite 202
Sacramento, CA 95821

Internal Revenue District of San Francisco

Periods January 1, 1973 to March 31, 1978

The Commissioner of Internal Revenue

To RICHARD MENDONCA, Chief Financial Officer of AFFILIATED INVESTMENTS & MORTGAGE COMPANY, dba AIM REAL ESTATE MARKETING AND COUNSELLING
At 3333 Watt Avenue, Suite 202, Sacramento, CA 95821

You are hereby summoned and required to appear before Special Agent JOAN VAN DEN BERG an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

1. Corporate books and records including cash receipts and cash disbursements, journals and ledgers; for the period of January 1, 1973 to March 31, 1978 for AFFILIATED INVESTMENTS & MORTGAGE COMPANY, dba AIM REAL ESTATE MARKETING AND COUNSELLING;
2. Corporate payroll records for corporate officers, directors, employees and subcontract labor including payment to real estate agents, secretarial help, etc. Form W-2's, Wage and Tax Statements; Form 1099's, Miscellaneous Income Statement; Form 941, Quarterly Statement of Employee's Earnings; and Form 940, Annual Unemployment Tax Return for the period of January 1, 1973 to December 31, 1977.

(continued on attache sheet)

Business address and telephone number of Internal Revenue Service officer named above:
801 I St., Rm. 292, Sacramento, CA 95814 (916) 440-3130

Place and time for appearance:
at 801 I Street, Room 292, Sacramento, Cal.
on the 22 day of January, 1979 at 9 o'clock A. M.

Issued under authority of the Internal Revenue Code
this 4 day of January, 1979

Joan M. Van Den Berg
Signature of Issuing Officer

Special Agent
Title

Signature of Approving Officer
(if applicable)

Group Manager
Title

to be retained by IRS

Form 2039 (Rev. 3-77)

GOVERNMENT EXHIBIT 28

Certificate of Service of Summons and Notice

(Pursuant to section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date January 4, 1979	Time 8:50 a.m.

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed.

Richard Mendonca

☐ I left an attested copy of the summons at the last and usual place of abode of the person to whom it was directed. I left the copy with the following person (if any):

Signature Joan M. Van Den Berg	Title Special Agent

This certificate is made to show compliance with section 7609, Internal Revenue Code. This certificate applies only to summonses served on third-party recordkeepers and not to summonses served on other third parties or any officer or employee of the person to whose liability the summons relates nor to summonses in aid of collection, to determine the identity of a person having a numbered account or similar arrangement, or to determine whether or not records of the business transactions or affairs of an identified person have been made or kept.

I certify that, within 3 days of serving the summons, I gave notice (Form 2039-D) to the person named below on the date and in the manner indicated.

Date of Giving Notice: ______________________ Time: ______________________

Name of Noticee: ______________________

Address of Noticee (if mailed): ______________________

How Notice Was Given

☐ I gave notice by certified or registered mail to the last known address of the noticee.

☐ In the absence of a last known address of the noticee, I left the notice with the person summoned.

☐ I gave notice by handing it to the noticee.

☐ I left the notice at the last and usual place of abode of the noticee. I left the copy with the following person (if any).

☐ No notice is required.

Signature	Title

Form 2039 (Rev. 3-77)

Attachment to Summons in re:

RICHARD W. RYLANDER, SR.
3333 Watt Ave., Suite 202
Sacramento, CA 95821

3. Check Record for AFFILIATED INVESTMENTS & MORTGAGE COMPANY, including deposit slips, record showing source of deposits, bank statements, checks issued and check record showing purpose of checks issued for the period January 1, 1973 to arch 31, 1978.

4. Clients trust records of property managed for Rents Collected and Disbursement of Expenses; and clients trust check records including deposit slips, record showing source of deposits, bank statement, checks issued and check record showing purpose of checks issued for the period of January 1, 1973 to December 31, 1977, for the following listed properties:

(1) 4231 60th Street
(2) 3308 Wemberly
(3) 588 Southgate
(4) 3639 Pinnel
(5) 3608 Mahogany
(6) 2109 Grand Avenue
(7) 2111 Grand Avenue
(8) 9024 Central Avenue
(9) 8787 Sunset
(10) 4441 39th Street
(11) 3928 Santa Fe Street
(12) 7320 Filbert Avenue
(13) 6601 24th Street

5. Corporate records of "Broker Demand Statement" (copyright 1975) issued to clients by AIM REAL ESTATE MARKETING & COUNSELLING for the period of January 1, 1973 to March 31, 1978;

6. Corporate records of "Contract of Employment" with clients issued by AIM REAL ESTATE MARKETING & COUNSELLING for the period of January 1, 1973 to March 31, 1978.

[GOVERNMENT EXHIBIT 30]

Richard W. (Dick) Rylander,
dba; Affiliated Investments & Mortgage Company;
AIM Real Estate Marketing and Counselling

3333 Watt Avenue, Suite 202
Sacramento, California 95821

January 17, 1979

Richard Mendonca
3333 Watt Avenue, Suite 202
Sacramento, California 95821

Re: Sumons—Internal Revenue Service—ORDER NOT TO COMPLY

Dear Mr. Mendonca:

On or about January 4, 1979, you received a Summons to provide certain information to the Internal Revenue Service concerning the above party(s).

Pursuant to the provisions of Section 7609 of the Interanl Revenue Code, you are hereby notified that you are *not to comply* with said Summons, nor appear on the date summoned.

I object totally to *any* examination of the files, documents, financial statements, and all other records set forth in the summons served upon you.

A copy of this ORDER NOT TO COMPLY has been forwarded this date to the Internal Revenue Service—Special Agent, Joan Van Den Berg, 801 I Street, Room 292, Sacramento, California 95814—by CERTIFIED MAIL (RRR)

Sincerely,

Richard W. (Dick) Rylander

Receipt verified: 17 January 1979

cc Internal Revenue Service (Joan Van Den Berg)

[GOVERNMENT EXHIBIT 31]

Form 2039
(Rev. 3-77)

Summons

In the matter of the tax liability of
RICHARD W. RYLANDER, SR.
3333 Watt Avenue, Suite 202
Sacramento, CA 95821

Internal Revenue District of San Francisco

Periods January 1, 1973 to March 31, 1978

The Commissioner of Internal Revenue

To EDWIN I. RYLANDER, Secretary of AFFILIATED INVESTMENTS & MORTGAGE COMPANY dba AIM REAL ESTATE MARKETING AND COUNSELLING
At 3333 Watt Avenue, Suite 202, Sacramento, CA 95821

You are hereby summoned and required to appear before Special Agent JOAN VAN DEN BERG an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

1. Corporate books and records including cash receipts and cash disbursements, journals and ledgers; for the period of January 1, 1973 to March 31, 1978 for AFFILIATED INVESTMENTS & MORTGAGE COMPANY, dba AIM REAL ESTATE MARKETING AND COUNSELLING;

2. Corporate payroll records for corporate officers, directors, employees and subcontract labor including payment to real estate agents, secretarial help, etc. Form W-2's, Wage and Tax Statements; Form 1099's, Miscellaneous Income Statement; Form 941, Quarterly Statement of Employee's Earnings; and Form 940, Annual Unemployment Tax Return for the period of January 1, 1973 to December 31, 1977.

Business address and telephone number of Internal Revenue Service officer named above:
801 I St., Rm. 292, Sacramento, CA 95814 (916) 440-3130

(continued on attached sheet)

Place and time for appearance:
at 801 I Street, Room 292, Sacramento, Calif.
on the 22 day of January, 19 79 at 9 o'clock A. M.

Issued under authority of the Internal Revenue Code
this 4 day of January 19 79

Joan M. Van Den Berg — Special Agent
[illegible]ture of Issuing Officer — Title

Group Manager
Signature of Approving Officer (if applicable) — Title

Original to be retained by IRS

Form 2039 (Rev. 3-77)

GOVERNMENT EXHIBIT
31

Attachment to Summons in re:

RICHARD W. RYLANDER, SR.
3333 Watt Ave., Suite 202
Sacramento, CA 95821

3. Check Record for AFFILIATED INVESTMENTS & MORTGAGE COMPANY, including deposit slips, record showing source of deposits, bank statements, checks issued and check record showing purpose of checks issued for the period January 1, 1973 to March 31, 1978.

4. Clients trust records of property managed for Rents Collected and Disbursement of Expenses; and clients trust check records including deposit slips, record showing source of deposits, bank statement, checks issued and check record showing purpose of checks issued for the period of January 1, 1973 to December 31, 1977, for the following listed properties:

(1) 5231 60th Street
(2) 3308 Wemberly
(3) 588 Southgate
(4) 3639 Pinnel
(5) 3608 Mahogany
(6) 2109 Grand Avenue
(7) 2111 Grand Avenue
(8) 9024 Central Avenue
(9) 8787 Sunset
(10) 4441 39th Street
(11) 3928 Santa Fe Street
(12) 7320 Filbert Avenue
(13) 6601 24th Street

Corporate records of "Broker Demand Statement" (copyright 1975) issued to clients by AIM REAL ESTATE MARKETING & COUNSELLING for the period of January 1, 1973 to March 31, 1978;

6. Corporate records of "Contract of Employment" with clients issued by AIM REAL ESTATE MARKETING & COUNSELLING for the period of January 1, 1973 to March 31, 1978.

[GOVERNMENT EXHIBIT 32]

AFFIDAVIT of Edwin I. Rylander
pertaining to IRS Administrative Summons (Form 2039) of January 4, 1979

State of California

County of Sacramento

I, Edwin I. Rylander, of the city of Sacramento, being duly sworn, state and depose as follows:

I am not a "Secretary" of Affiliated Investments & Mortgage Company, or of AIM Real Estate Marketing and Counselling.

I do not have any books or records, journals or ledgers, of Affiliated Investments & Mortgage Company, or of AIM Real Estate Marketing and Counselling, nor do I have knowledge of such records.

I do not have any payroll records (Form W-2's, Wage and Tax Statements; Form 1099's, Misc. Income Statements of Employee Earnings; Form 940, Annual Unemployment Tax Return) as called for in said Summons, nor do I have knowledge of such records.

Ido not have any knowledge of any check records of Affiliated Investments & Mortgage Company (deposit slips, record showing source of deposits, bank statements, checks issued and check records showing purpose of checks issued) as called for in Summons.

I do not have any clients trust records of property managed for rents collected and disbursement of expenses (client trust check records including deposit slips, record showing source of deposits, bank statements, checks issued and check record showing purpose of checks issued) for properties.

(1) 5231 60th Street
(2) 3308 Wemberly
(3) 588 Southgate
(4) 3639 Pinnel
(5) 3608 Mahogany
(6) 2109 Grand Avenue
(7) 2111 Grand Avenue
(8) 90[illegible] Central Avenue
(9) 8787 Sunset
(10) 4441 39th Street
(11) 3928 Santa Fe Street
(12) 7320 Filbert Avenue
(13) 6601 24th Street . . . nor do I have knowledge of such records.

I do not have any records of "Broker Demand Statement" (Copyright 1975) of AIM Real Estate Marketing and Counselling as called for in said Summons.

I do not have any records of "Contract of Employment" of AIM Real Estate Marketing and Counselling as called for in said Summons.

As the above referenced Summons concerns the tax liability of one Richard W. Rylander, Sr., and as I have been served with a proper *notice not to comply with said Summons* in accordance with Section 7609 of the IRS Code—I will not appear before Special Agent Joan Van Den Berg on January 22, 1979, at 9:00 A.M.

____

Edwin I. Rylander

Before me, a Notary Public, did appear *Edwin I. Rylander*, who, being duly sworn, did sign the foregoing Affidavit on this 17th day of January 1979.

____

Notary Public

[GOVERNMENT EXHIBIT 33]

Richard W. (Dick) Rylander,
dba; Affiliated Investments & Mortgage Company;
AIM Real Estate Marketing and Counselling
3333 Watt Avenue, Suite 202
Sacramento, California 95821

January 17, 1979

Edwin I. Rylander
3333 Watt Avenue, Suite 202
Sacramento, California 95821

Re: Summons—Internal Revenue Service—*ORDER NOT TO COMPLY*

Dear Mr. Rylander:

On or about January 4, 1979, you received a Summons to provide certain information to the Internal Revenue Service concerning the above party(s).

Pursuant to the provisions of Section 7609 of the Internal Revenue Code, you are hereby notified that you are *not to comply* with said Summons, nor appear on the date summoned.

I object totally to *any* examination of the files, documents, financial statements, and all other records set forth in the summons served upon you.

A copy of this ORDER NOT TO COMPLY has been forwarded this date to the Internal Revenue Service—Special Agent, Joan Van Den Berg, 801 I Street, Room 292, Sacramento, California 95814—by CERTIFIED MAIL (RRR)

Sincerely,

Richard W. (Dick) Rylander

Receipt verified: January 1979

cc Internal Revenue Service (Joan Van Den Berg)

U.S. MARSHALS SERVICE
PROCESS RECEIPT and RETURN

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

13977

PLAINTIFF: UNITED STATES OF AMERICA
COURT CASE NUMBER: S-79-570-LKK

DEFENDANT: RYLANDER & CO., REALTORS, INC., ET AL.
TYPE OF PROCESS: ORDER ENFORCING SUMMONS

SERVE NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC. TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
RICHARD W. (DICK) RYLANDER, SR.

AT ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
3333 Watt Ave., Suite 202
Sacramento, CA 95821

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW:

SOLOMON E. ROBINSON
Assistant U. S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, CA 95814

Number of process to be served with this Form-285: 1
Number of parties to be served in this case:
Check for service on U.S.A.

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE (Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available For Service):

Please Serve As Soon As Possible

SERVE: PERSONALLY: RICHARD W. (DICK) RYLANDER, SR.

SOLOMON E. ROBINSON
☒ PLAINTIFF ☐ DEFENDANT
TELEPHONE NUMBER: 2331
DATE: 1/16/80

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY — DO NOT WRITE BELOW THIS LINE

District of Origin No. 97
District to Serve No. 97
Signature of Authorized USMS Deputy or Clerk
Date: 1-16-80

☑ have personally served, ☐ have legal evidence of service, ☐ have executed as shown in "Remarks"

1 Rylander
Inn
Auburn Blvd Sac CA

☐ A person of suitable age and discretion then residing in the defendant's usual place of abode.

Date of Service: 1/17/80
Time: 9:25

Signature of U.S. Marshal or Deputy: Carolyn F Griffin

Forwarding Fee: —
Total Charges: 13.08

1-17 6812KK

2. USMS RECORD

FORM USM-285 (Rev. 11/11/77)

Best Copy Available

EXHIBIT
39

RICHARD W. (DICK) RYLANDER, SR.
Temporary Local Mailing Address:
P.O. Box 13497
Sacramento, California 95813
Temporary Local Message Phone:
(916) 481-0818

IN PROPRIA PERSONA
without waiving assistance of counsel

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

Criminal No. S–80–44
(Associated Civil Cases:
(S–79–570 and S–79–571)

UNITED STATES OF AMERICA, *Plaintiff,*

v.

RICHARD W. (DICK) RYLANDER, SR., *Defendant.*

OATH IN PURGATION OF CONTEMPT and Release of Records

I, RICHARD W. (DICK) RYLANDER, SR., Defendant herein, by way of special appearance for the sole purpose of purging myself of contempt, make this sworn Oath in purgation of contempt and release of records to make evidence to this Court that I have not acted in a willfully unlawful, contumaciously unlawful, unrightful, or otherwise faultful manner in regards to any Decree or Order of this Court.

I swear on oath that I have no such records as called for in the Court's order of January 16, 1980, in the name of Affiliated Investments & Mortgage Company dba AIM Real Estate Marketing and Counselling and in the name of Rylander & Co., Realtors, Inc. I further swear on oath that I know not the location of any such records, if any there be, or that any such record if any there be, are in anyway under my control or supervision or that I have in anyway placed any such records, if any there be, in the hands of any other person to hold for me. I further swear on oath that I have no intent plan or purpose to withhold any such records, if any there be, from the Court as called for in the Court's order of January 16, 1980, and I hereby release any such records, if any there be, which anyone may in anyway deem to require my release to this court.

TO WHOM IT MAY CONCERN:

I, Richard W. (Dick) Rylander, Sr., do hereby authorize, order and command, if such authorization, order or command is required, that any person place or thing having or holding any such records, if any there be, as called for in the Federal District Court's Order of January 16, 1980, in Civil Case No.'s S–79–570 and S–79–571, that they turn over immediately any such records to any authorized representative of this Federal District Court.

I, RICHARD W. (DICK) RYLANDER, SR., declare by sworn oath and under penalty of perjury that the testimony, declaration and oath I have attested to herein is the truth and nothing but the truth so help me God.

Dated this 9th day of October, 1980, at Sacramento, California.

Richard W. (Dick) Rylander, Sr.

Subscribed and sworn to before me this 9th day of October, 1980

Edward C. Brodie
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

Civil Action File No. S–79–570 LKK
79–571–LKK

United States of America, *Plaintiff*,

v.

RICHARD W. RYLANDER, *Defendant*.

JUDGMENT

This action came on for trial before the Court, Honorable Lawrence K. Karlton, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, October 24, 1980.

It is Ordered and Adjudged pursuant to the findings of fact and conclusion of law and the court order of October 23, 1980, judgment is hereby entered in favor of the plaintiff and against the defendant in the above entitled case.

Dated at Sacramento, California, this 24th day of October, 1980.

J. R. Grindstaff
Clerk of Court
BY L. WILSON,
Deputy Clerk

UNITED STATES DISTRICT OF COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil S–79–570 and
Civil S–79–571

UNITED STATES OF AMERICA, *Plaintiff,*

v.

RICHARD W. (DICK) RYLANDER, SR., *Defendant.*

At a stated term of the United States District Court for the Eastern District of California, held at the Courtroom thereof, in the City of Sacramento, on November 19, 1980.

PRESENT: The Honorable LAWRENCE K. KARLTON, U.S. District Judge

IT IS ORDERED by the Court this date that the previous order and judgment be re-entered and the defendant is hereby remanded to the custody of the United States Marshal for imprisonment in a jail-type institution until he either produces the documents or by testimony of why he cannot do so.

IT IS FURTHER ORDERED that defendant's incarceration is stayed until 12:00 NOON on Friday, December 12, 1980, so that he can seek a further stay or writ from the 9th Circuit Court of Appeals.

I HEREBY CERTIFY that the foregoing is a true and correct statement of an order made in the above entitled case.

J. R. Grindstaff, *Clerk*
By ________________________
SHARON JAGGARD, *Courtroom Clerk*

Dated: November 19, 1980

United States of America vs.

United States District Court for
EASTERN DISTRICT OF CALIFORNIA

DEFENDANT RICHARD W. (DICK) RYLANDER, SR.

DOCKET NO. Cr. S-80-44

JUDGMENT AND PROBATION/COMMITMENT ORDER

[illegible] 5/75)

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
November	19	1980

COUNSEL

☒ WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☐ WITH COUNSEL ______ (Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/~~verdict~~ of
☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of two counts of criminal contempt.

ORIGINAL
FILED
NOV 19 1980
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. ~~Because no sufficient cause to~~ the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) MONTHS in a jail-type institution as to the first count of criminal contempt.

IT IS FURTHER ORDERED that the defendant is to serve SIX (6) MONTHS in a jail-type institution as to the second count of criminal contempt of which the defendant was convicted, which shall run concurrent with the sentence imposed in the first count.

IT IS FURTHER ORDERED that sentence is to commence upon the termination of incarceration resulting by virtue of the defendant's failure to purge himself of civil contempt under the Court's order in Civil No. S-79-570 and S-79-571.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that if by virtue of appeal or writ this Court's Order remanding the defendant to the custody of the United States Marshal in the civil cases is erroneous, then upon any such order so finding becoming final, service of the sentence herein imposed shall commence forthwith.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
THIS DATE 11-19-80
By ______
( ) CLERK
(X) DEPUTY

SIGNED BY
☒ U.S. District Judge
☐ U.S. Magistrate

LAWRENCE K. KARLTON Date 11-19-80

[TRANSCRIPT OF MEETING BETWEEN RESPONDENT AND IRS AGENTS, FEBRUARY 4, 1980. SUBMITTED TO COURT OF APPEALS]

[1] Testimony of RICHARD W. RYLANDER, SR., pursuant to Civil Action No. S–79–570–LKK and Civil Action No. S–790–571–LKK, Order Enforcing Summons.

MR. RYLANDER:

RICHARD (DICK) RYLANDER, SR., shall appear on Monday, February 4, 1980, at 10:00 a.m. before JOAN VAN DEN BERG, or other person designated by Petitioner—

AL FRIEDENBERG:

And someone else.

MR. RYLANDER: That's what the Court Order says, sir.

AL FRIEDENBERG: I know what the Court Order says. Let's go in here (indicating to Mr. RYLANDER to move the interview into the Group Manager's Office).

MR. RYLANDER: I wish to make this statement. I am in Room 292—

AL FRIEDENBERG: You want to come in here?

S/A VAN DEN BERG: Are you tape recording this?

MR. RYLANDER: Yes.

S/A VAN DEN BERG: Then, I will have to tape record it. Just a second. (At this point S/A VAN DEN BERG left the room and went to the conference room, Rm. 297, to get her tape recorder. Mr. RYLANDER continued to make his statement after S/A VAN DEN BERG left the room.)

MR. RYLANDER: I'm going to make my statement here in Room 292. I am appearing here in response to Court Order filed January 16, 1980 in Civil Action S–79–570 and S–79–571 [2] which Orders are incorrect in relation to me. I state that I am not President of RYLANDER AND CO. REALTORS, INC., nor was I President of RYLANDER AND CO. REALTORS, INC., nor was I President of said corporation, if any there be, at the time papers were handed me in this matter on November 30, 1979, by the

Deputy U.S. Marshall; nor was I President of said corporation, if any there be, on January 4, 1979—

(At this point S/A VAN DEN BERG re-entered the room and plugged in the tape recorder. She requested RYLANDER to read his statement from the beginning as she was not present when he began to read his statement.)

S/A VAN DEN BERG:

Q. Are you ready—okay.

MR. RYLANDER:

A. Are you ready? Okay, I'm—

VAN Q. —first of all, I would like to identify that we are in Room 292, my name is JOAN VAN DEN BERG. The date is February 4th; it is 10:10 a.m. Mr. RYLANDER has come to the office, requested that we retire to the conference room; however, Mr. RYLANDER has expressed an opinion that he wishes to stay in Room 292. This is a public door and anybody can walk in. Therefore, any statement you may make may be available to anybody walking in the door. Now, we request that you go into a conference room; however;—

RY A. Okay, I am here—

VAN Q. —if you so choose you may stay here.

[3] RY A: I am here complying with the Court Order. The Court Order says before you or another person, an other person. There are other people here which I object to. It says 292, and that's where I am. It doesn't say across the hall, in some other room, or whatever. Very specifically, it says 292—

VAN Q: Okay.

RY A: —it is—

VAN Q: Before we continue though—

RY A: It is 10:00—it is after ten (10) and my apologies because I was late finding a parking place; it was to be at 10 o'clock. I wish now to proceed with my statement—

VAN Q: Okay, Mr. RYLANDER—

RY A: I am appearing here in response to—

VAN Q: Excuse—

AL FRIEDENBERG: Wait, could you—

VAN Q: Excuse me, you have a dual capacity; one (1) as the taxpayer under investigation—

RY A: Ma'am, let me read my statement, please?

VAN Q: —and one as—well, I have to read you your rights, unless you waive that?

RY A: No, you read me my rights again.

VAN Q: Okay.

AL FRIEDENBERG: Excuse me, JOAN, could we move in here where it will be a little bit more private, so that the whole world doesn't have to come in here and hear your statement?

[4] RY A: Well, we would hope that the whole world doesn't come into the Criminal Investigation Division. I've asked you folks here to please remove yourselves; this is 292, and that's—I wish to proceed with that.

Please read me my rights. These are my Constitutional rights.

VAN Q: Okay, as a Special Agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws and related offenses. In connection with my investigation of your tax liability, I would—

RY A: Miss VAN DEN BERG, would you please—

VAN Q: —like to ask you some questions.

RY A: —would you please start again reading my rights, the copy machine, I'm sure, knocked out the recorders.

VAN Q: Okay. As I say, this is—

RY A: I understand that—

VAN Q: —public.

RY A: --this is 292, and this is where I am.

VAN Q: Now, okay, let's start all over again. As a Special Agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws and related offenses. In connection with my investigation of your tax liability, I would like to ask you some questions. However, first, I advise you that under the Fifth Amendment of the Constitution of the United States, I cannot compel you to answer any questions or to submit any information [5] if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents you submit may be used against you in any criminal proceedings which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding. Do you understand these rights?

RY A: Ah, I understand my Constitutional rights. I am not sure that the Internal Revenue Service understands my Constitutional rights.

VAN Q: I think you'd have to answer either—

RY A: I said—

VAN Q: —you do, you do understand your rights?

RY A: I said that I understand my rights.

VAN Q: Okay. However, you may waive the right to seek the assistance of an attorney before responding; you may also voluntarily answer or submit information at this time if you so desire.

RY A: You see, I waive no, none of my rights.

AL FRIEDENBERG: JOAN—

VAN Q: Do you—excuse me.

AL FRIEDENBERG: Just indicate on the tape that we've asked Mr. RYLANDER to move into a more private room, and he's refused.

RY A: This room appears to be private to me.

AL FRIEDENBERG: It's not private, and we'd like you to move [6] into someplace—

RY A: It appears to be private to me, sir.

AL FRIEDENBERG: This is a public office—

RY A: Well, all the offices are public. I'm sure the one across the street is also public. It's owned, supposedly, by the people of the United States.

AL FRIEDENBERG: No one has access to this one, as they do to that one.

RY A: Well, okay, I prefer to remain in 292, which is what the Court Order says, and this is what, was the number on the door, and this is where I came in.

AL FRIEDENBERG: All right, JOAN, let Mr. RYLANDER read his statement.

RY A: I wish to proceed with my statement. I am appearing here in response to Court Orders filed January 16th, 1980, in Civil Actions S–79–570 and S–79–571, which orders are incorrect in relation to me. I state that I am not President of RYLANDER AND COMPANY REALTORS, INC., nor was I President of said corporation, if any there be, at the time papers were handed me in this matter on November 30, 1979, by the Deputy U.S. Marshall; nor was I President of said corporation if any there be, on January 4, 1979, when I was handled—when I was handed Internal Revenue Service Administrative Summons, Form 2039, in this matter. I have no such corporation records as demanded in said Court Order; therefore, I am appearing in accordance with said Court Order, but I cannot [7] comply with that portion of said Order concerning corporation records—

VAN Q: You make a statement that—

RY A: —as I have no such records.

VAN Q: —you have no such records.

A: I further state I am not President of AFFILIATED INVESTMENTS AND MORTGAGE COMPANY, dba AIM REAL ESTATE MARKETING AND COUNSELLING; nor was I President of said corporation and dba, if any there be, at the time papers were handed to me in this matter on November 30, 1979 by the Deputy U.S. Marshall; nor was I President of said corporation and dba, if any there be, on January 4, 1979, when I was handed Internal Revenue Service Administrative Summons, Form 2039, in this matter. I have no such corporate records as demanded in said Court Order; therefore, I am appearing in accordance with said Court Order, but I cannot comply with that portion of said Order concerning corporation records, as I have no such corporation records. Now, that concludes my statement, and that concludes the matter for which we are to appear here today.

VAN Q: Now, Mr. RYLANDER—

RY A: So, I will now excuse myself—

VAN Q: —the Secretary of State's Office indicates that you were Corporate President during the period of time that we requested these records.

RY A: I believe this concludes my compliance with the Court Order

[8] VAN Q: —are you—

Do you care to answer that question, I said the Secretary of State's Office—

RY A: I believe this concludes my compliance with the Court Order.

VAN Q:7No, I'm afraid that doesn't comply with the Court Order because you were, in fact, according to the Secretary of State Office—

RY A: I believe, I believe, I believe I have complied with the Court's Order. Ordered that RICHARD (DICK) RYLANDER, SR., shall appear on Monday, February 4, 1980 at 10:00 a.m. before JOAN VAN DEN BERG, or other person designated by Petitioner, at the Office of the Internal Revenue Service, at 801 I Street, Room 292, Sacramento, California, and then and there produce for Petitioner's inspection and copying the records described in the IRS Summonses attached hereto, etc. And that is the extent of the Order.

AL FRIEDENBERG: Excuse me, Mr. RYLANDER, do you have the records that the Subpoena called for?

RY A: I have just read my statement, sir, and that concludes our business here today. I have complied with the Order.

AL FRIEDENBERG: Do you have, do you have the records—

RY A: I have made my statement, sir, and that is on the record—

AL FRIEDENBERG: So, it's a fair thing to say that you're not going to give us the records that the Court Order request that you bring—

[9] RY A: Sir, I have made my statement.

AL FRIEDENBERG: Okay, this interview is terminated—

RY A: I have no such corporation records as demanded in said Court Order; therefore, I am appearing in accordance with said Court Order, but I cannot comply with this portion of said Order concerning corporation records, as I have no such corporation records.

AL FRIEDENBERG: Okay, fine. Thank you for appearing.

RY A: Sure.

VAN Q: Mr. RYLANDER, do you deny that you were—

RY A: I believe that concludes—

VAN Q: Okay, that's your statement.

RY A: —my compliance with the Order. If you would like to read the Order over again—

VAN Q: I read the Order, sir, and the fact of the matter was—

RY A: Well, would you please read it out loud? Would you please

VAN Q: Yes.

RY A —read the Order, the Court's Order, JOAN—

VAN Q: Okay. Yes, let's go through this Summons—

RY A: JOAN, the Court's Order, please read the Court's Order

VAN Q: It says—

RY A: Read the Court's Order.

AL FRIEDENBERG: JOAN, JOAN—

VAN Q: Well, I will.

AL FRIEDENBERG: —why don't we just—

VAN Q: No, I think we should get it into the record that the

[11] R/A OGIHARA: Well, I've got a better watch than you do then.

MR. RYLANDER: I doubt that.

S/A VAN DEN BERG: I don't care to argue the point.

MR. RYLANDER: All right, thank you.

S/A VAN DEN BERG: Thank you. My watch states it is 10:10 a.m. and Mr. RYLANDER departed.

JOAN M. VANDENBERG, SPECIAL AGENT 2-6-80

AL FRIEDENBERG, ACT'G GROUP MANAGER

GEORGE OGIHARA, REVENUE AGENT 2-6-80

(Note: It should be noted that while Mr. RYLANDER was making his statement (Pg. 6, lines 14 through 26, and Pg. 7, lines 1 & 2) S/A VAN DEN BERG locked the door to Room 292, to preclude entry by the public during the interview.)

Supreme Court of the United States

No. 81-1120

UNITED STATES, ET AL., *Petitioners*,

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF RYLANDER & CO. REALTORS, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed April 26, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Opposition

RECEIVED
MAR 26 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

81-1120

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT,
PETITIONERS

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC. AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

Respondent contends that the petition for a Writ of Certiorari in this matter should be denied because: 1) the decision in the summons enforcement hearing was not rendered on the merits and is not res judicata as to matters raised at the contempt hearing; 2) the Ninth Circuit's holding that respondent met his burden of production in the contempt hearing by stating under oath that he could not comply with the summons is in accord with the decisions of this Court; 3) respondent properly tendered the issue of inability to comply by making statements as such for the record and did not waive his Fifth Amendment rights by doing so; and 4) if petitioner's view is followed, it would effectively deny respondent his Fifth Amendment rights.

STATEMENT OF THE CASE

On August 10, 1979, the United States (hereinafter "government") petitioned the United States District Court for the Eastern District of California to enforce two Internal Revenue Service (IRS) summonses originally issued on January 22, 1979. These summonses directed respondent, RICHARD W. RYLANDER, SR., to appear, testify and produce certain corporate books and records of two corporations of which respondent was allegedly the president. The Honorable Lawrence K. Karlton, District Judge, issued an Order to Show Cause directing respondent to appear on January 14, 1980 and show cause why the summonses should not be enforced.

At the show cause hearing, the government proceeded by way of an offer of proof to establish that respondent was president of the subject corporations. Respondent did not appear at the hearing, but instead returned the order to the court together with a letter explaining that he was not the president of the entities. The court enforced the summonses, ordering respondent to appear before an IRS agent on February 4, 1980 and produce the requested records.

In compliance with the court's order, respondent appeared before the IRS agent and, after being advised of his Fifth Amendment rights (Excerpt p. 17), stated for the record that he had none of the demanded records and therefore, could not produce them. (Excerpt pp. 19-22) Respondent further stated that he was not waiving any of his rights, specifically his Fifth Amendment rights.

Despite Mr. Rylander's denial of possessing the records, the IRS petitioned for enforcement of the court's order, and the court issued an order to show cause why respondent should not be held in contempt.1) A court trial2) on the contempt charge was held on October 8, 1980. Rylander was not represented by counsel at the trial.[3] The government's case paralleled its offer of proof at the hearing to enforce the summons. This evidence essentially established that the two corporations were ongoing entities and that respondent's name appeared on corporate tax returns and bank accounts. The government argued that respondent must, therefore, be in possession of any corporate records. However, there was no evidence introduced to establish that the records sought by the subpoenas actually existed or that respondent, in fact, had any form of custody or control over the records.

On these limited facts, the trial court found that, by the weight of the evidence,[4] respondent was in contempt for failure to produce the documents. The court remanded respondent to the custody of the Attorney General until such time as he purged himself of the contempt by either complying with the court's order to produce, or testifying as to why he could not produce the documents. Respondent offered to testify, but the government indicated its intention to cross-examine him. Because respondent's Fifth Amendment rights might be affected by the cross-examination, the court continued the matter until counsel could be appointed to advise Rylander.

The following morning, without seeking the approval of counsel, respondent filed a sworn "Oath in Purgation of Contempt" stating that he did not have any of the documents requested by the IRS summons. On October 23,1980, Rylander testified in open court that he did not have the documents, but declined to answer any further questions on their whereabouts on Fifth Amendment grounds. The court then reinstated its order holding Rylander in contempt and setting the same purging conditions.

The Ninth Circuit reversed respondent's conviction on appeal. Initially, the court ruled that the findings in the summons enforcement hearing did not have the effect of res judicata so as to prohibit respondent from raising the defense of inability to comply at the contempt trial. The court found that the issue of Rylander's ability to comply had not actually been litigated in the prior hearing. 656 F.2d at 1318.

After this preliminary finding on res judicata, the appellate court went on to examine the procedures and requirements of a contempt proceeding. The court noted that inability to comply is a defense for which the burden of production rests on the defendant. Id. The ultimate burden of persuading the court that the defendant has the actual ability to comply remains with the government. Id.

In possible conflict with the defendant's burden is his Fifth Amednment right against self-incrimination. If there is a bonafide assertion of a Fifth Amendment claim, the right may be violated by requiring the defendant to produce categorical and detailed evidence of his inability to comply. Id at 1319. The defendant could be placed in the dilemma of incarceration for contempt or self-incrimination. Id.

Therefore, the subject of a subpoena requiring production of documents must either comply or state under oath that he does not have possession or control of them. Id. This statement, coupled with a valid Fifth Amendment claim, operates to satisfy the defendant's burden of production and shifts the burden of showing that the documents actually exist in his custody or control to the government. Id. The appellate court held that the government's inferential sequence of proof failed to satisfy its burden in this case. Id at 1319-20. Accordingly, the Ninth Circuit remanded the case for additional findings on the validity of Rylander's Fifth Amendment claim. Id. The court also ordered that the government be given an additional opportunity to satisfy its burden of proof. Id.

///

Reasons For Denying The Petition

1. The Ninth Circuit's decision does not conflict with established law regarding the estoppel effect of an enforcement order. While petitioners allege that the opinion of the Court of Appeals conflicts with the decisions in Maggio v. Zeitz, 333 U.S. 56 (1948); United States v. Peter, 479 F.2d 147 (6th Cir. 1973); United States v. Secor, 476 F.2d 766 (2d Cir. 1973), a close examination of those cases reveals significant distinctions with the facts herein and actually indicates uniformity of decisional law.

The summons enforcement hearing in this case merely consisted of an offer of proof by the government. (CT 10: 14-25, 11,12 and 13) Respondent made no appearance. There was no actual litigation of the validity of the order or respondent's ability to comply. Res judicata only applies when there is a final judgment rendered on the merits in the prior proceeding and the subsequent proceeding is based on the same cause of action or claim. Hooker v. Klein, 573 F.2d 1360,1367(9th Cir. 1978) Because there was no final judgment rendered on the merits in the prior proceeding, and the contempt proceeding involves issues different from the enforcement hearing, respondent should not be barred from raising his defenses at the contempt hearing.

Significantly, in each of the allegedly conflicting cases cited by petitioner, the alleged contemner had actually litigated his defense to the contempt charge in the prior enforcement hearing. See Maggio v. Zeitz, supra, 333 U.S. at 59,71; United States v. Peter, supra, 479 F.2d at 150; United States v. Secor, supra, 476 F.2d at 767. Undoubtedly, these prior findings precluded later challenges at the contempt hearing based on the same grounds. Respondent herein has never challenged the validity of this legal concept and the appellate opinion below specifically distinguished these cases because respondent's defense was not actually litigated at the prior proceeding. See 656 F.2d at 1318 n,6.

Furthermore, the *Peter* and *Secor* decisions are distinguishable in that the defenses raised at each proceeding challenged the validty of the summons not the ability of the subject to comply. Both Peter and Secor claimed that the order to turn over records violated their Fifth Amendment privileges. See 479 F.2d at 149; 476 F.2d at 767. In contrast, Rylander has not claimed that the order to produce violates his right against self-incrimination. Rather, he claims that he is unable to comply with the court's order, and that any attempt to compel testimony from him as to the whereabouts of the records would violate his Fifth Amendment rights.

A defense that challenges the validity of the summons, as in *Peter* and *Secor*, is a defense that can be raised once and only once. This is not true for the defense of inability to comply. As this court explained in *Maggio v. Zeitz*, civil contempt is designed as a remedy to compel compliance with the court's order. 333 U.S. at 68. The principle would be violated and the remedy useless if the subject is unable to comply with the order. *Id* at 72. Therefore, this court concluded that, regardless of the adjudication in the enforcement hearing, the defense of inability to comply can again be raised at the contempt hearing:

> We agree with the Court of Appeals that the turnover order may not be attached in the contempt proceedings because it is res judicata on this *issue of possession at the time as of which it speaks*. . . [The alleged contemner] cannot challenge the previous adjudication of possession, but that does not prevent him from *establishing lack of present possession*. *Id* at 75. (Emphasis added)

Therefore, case law wholly supports respondent's right to raise the defense of inability to comply at the comtempt hearing. The issue of his possession of the requested documents was never adjudicated at the enforcement hearing, and no finding was made on that issue by the court. Additionally, the underlying purpose of civil contempt demands that respondent be permitted to raise the defense at the contempt hearing even if it was litigated earlier.

2. Petitioners assert that the Court of Appeals erred in holding that respondent had met his burden in the contempt proceeding by stating under oath that he did not possess the records and relying on his Fifth Amendment privilege when questioned as to their whereabouts. Two principles established by this court support the Ninth Circuit's conclusion on this issue.

First, it is indisputable that a custodian of corporate records cannot object to a valid summons for their production based on a personal Fifth Amendment claim. United States v. White 322 U.S.694,701 (1944); Wilson v. United States, 221 U.S. 361, 385(1911). The custodian's duties extend to a requirement that he give sworn testimony that he does not possess the records when he fails to produce them in response to a valid summons. United States v. O'Henry's Film Works, Inc., 598 F.2d 313,318 (2d Cir. 1979). Second, even though the custodian cannot assert a Fifth Amendment objection to production of the documents, he does retain his privilege against self-incrimination when questioned as to the whereabouts of the records. Curcio v. United States, 354 U.S. 118, 123-24 (1957).

The opinion of the Court of Appeals merely follows these well settled principles.5) By swearing under oath that he does not possess the subpoenaed records, the putative custodian has both tendered the defense of inability to comply, and supported it with his own testimony. Requiring him to go further, and testify as to the whereabouts of the records, would effectively compel him to waive his Fifth Amendment rights.

The Ninth Circuit has simply required that the government at least produce some evidence that the records exist in the control of the custodian before compelling him to waive his rights and testify as to their whereabouts. Petitioners allege that this holding conflicts with established case law. However, a careful review of the cases cited on pages 12-13 of the Petition for a Writ of Certiorari reveals that this allegation is misplaced and the cases frequently lend support to the Ninth Circuit's decision.[6]

For example, the Tenth Circuit has held that a custodian of corporate records, who denies possession and ability to comply and refuses to answer questions regarding the whereabouts of the records on Fifth Amendment grounds, cannot be held in contempt without some showing by the government that the records exist. United States v. Hansen Niederhauser Co. Inc., 522 F.2d 1037,1040 (10th Cir. 1975). Both this holding and that of the Ninth Circuit herein are inferentially supported by this court's decision in United States v. Fleischman, 339 U.S. 349, 355-56 (1950) wherein it was recognized that the government must make some showing that the subpoenaed records exist and can be produced by the defendant once he has claimed inability to comply.

Finally, petitioners are mistaken in asserting that the holding of the Court of Appeals herein means that the burden of proof will shift "solely as a result of respondent's invocation of the Fifth Amendment privilege." (Petition at 13). In contrast, the Ninth Circuit actually held:

> When the defendant has made a bonafide Fifth Amendment claim, his statement that the documents are not in his possession or under his control is sufficient to satisfy his burden of production. 656 F.2d at 1319.

It is the sworn statement of respondent that he cannot comply with the court's order that shifts the burden to the government. This ruling accomodates both the custodian's duty to produce the requested records, or to deny any ability to do so, and his privilege not to be forced to testify as to their whereabouts. To go further and follow petitioner's view would place the custodian in the dilemma of facing either contempt for failure to produce or self-incrimination when the government has not even made the slightest showing that the records it seeks are in existence.7)

3. Respondent has, on at least four occasions, stated for the record that he is not in possession of the requested documents, and cannot produce them. When he appeared before the IRS agent on February 4, 1980, respondent stated for the record that he was not in possession of the documents. (Excerpt pp.19-22) At the conclusion of his trial, respondent again stated he did not have the records, and could not produce them. (RT 263: 17-18) On October 9, 1980, respondent filed his oath in purgation of contempt to the same effect. (Excerpt pp. 87-88) Finally, respondent testified under oath that he did not have the records on October 23, 1980. (RT 323: 18-21)

These statements by respondent have been left wholly unrebutted by petitioners. There has been absolutely no showing that the requested records exist and are in the defendant's control. Accordingly, petitioners have not established a case of contempt against respondent. See United States v. Fleischman, supra, 339 U.S. at 355-56; United States v. Hansen Niederhauser Co. supra, 522 F.2d at 1040.

It is the duty of the putative custodian to either produce the requested documents or state for the record that he is unable to do so. United States v. O'Henry's Film Works, supra, 598 F.2d at 318. This obligation is not protected by the Fifth Amendment. United States v. White, supra, 322 U.S. at 701. It is not until the custodian is questioned as to their whereabouts that he can properly raise the objection. Curcio v. United States, supra, 354 U.S. at 123-24.

Therefore, when the putative custodian makes his statement that he cannot produce the records, he is fulfilling his legal obligation and placing the burden on the government to rebut him. He cannot raise a Fifth Amendment objection at that point and has not waived his right to later raise it by making the required statement. Accordingly, petitioner's argument that respondent waived his privilege against self-incrimination in this case is misplaced.

Petitioners allege that the opinion of the Court of Appeals conflicts with the decision in United States v. Hankins, supra, on the issues of cross-examination and waiver. However, when Hankins first appeared before IRS agents, he simply said that he would not produce the records. 565 F.2d at 1348. At the contempt hearing, Hankins never made a personal statement that he could not comply with the production order, but merely had his attorney make that representation to the court. Unlike this case, there was no required statement in Hankins that he could not produce the records and his offer to testify was made in an attempt to rebut strong evidence offered by the government that the records were in his control.

CONCLUSION

If petitioner's contentions are followed in this case, the IRS will be empowered to conduct "fishing expeditions" for records that may not even exist. When an individual is unable to comply with an IRS subpoena, he will be forced into the dilemma of contempt for nonproduction or self-incrimination. If the IRS is allowed to search for any record it believes might exist, and place the burden of disproving its existence on the individual, the putative custodian's Fifth Amendment privilege will be utterly worthless.

The Ninth Circuit's holding simply provides that before the IRS can subject someone to this dilemma of contempt or self-incrimination, it must make some showing that the records it seeks really exist. Such a requirement is hardly burdensome and is a fair and reasonable way to protect individuals from potential harrassment and a serious dilemma that the Fifth Amendment was expressly designed to prevent.

DATED: March 24, 1982

CLARK & HARBISON

By: Joseph F. Harbison III
JOSEPH F. HARBISON, III

Timothy P. Murphy
TIMOTHY P. MURPHY

END NOTES

1) Respondent was also charged with criminal contempt for avoiding service, failure to comply with the order to produce, and failure to appear at a show cause hearing. Only the latter two charges resulted in convictions. Respondent's appeal is still pending before the Ninth Circuit.

2) Respondent's arguments that the civil and criminal contempt trials were improperly combined, and that he was denied his right to a trial by jury were rejected by the Ninth Circuit. See United States v. Rylander, 656 F.2d 1313,1316 n.2. (9th Cir. 1981).

3) The Ninth Circuit denied respondent's argument that his conviction be overturned for denial of his right to counsel. 656 F.2d at 1316 n.2.

4) The trial court applied an erroneous standard of proof. Civil contempt must be proven by clear and convincing evidence. United States v. Powers, 629 F.2d 619,626 n.6.(9th Cir. 1980); United States v. Rizzo, 539 F.2d 458,465 (5th Cir. 1976). The Ninth Circuit did not have to address this issue, although it was raised by respondent in his opening brief.

5) "Finality occurs when the district court has made a determination on the merits as to the validity of the summoned person's defenses to each question asked and each document requested." United States v. Asay, 614 F.2d 655,659 (9th Cir. 1980)

6) It is important to note that the decision in United States v. Meeks, 642 F.2d 733 (5th Cir. 1981) of which petitioners are also seeking review by this Court, goes considerably beyond the Ninth Circuit's holding. The Meeks decision essentially means that no one can ever be held in contempt who invokes the Fifth Amendment privilege when asked to explain his inability to comply with the production order.

7) In McPhaul v. United States, 364 U.S. 372,378 (1960) the alleged contemner refused to give any testimony explaining his nonproduction and never claimed that the records did not exist or were not in his possession.

Nilva v. United States, 352 U.S. 385, 394(1957) was a criminal contempt case where the court expressly found that the defendant had failed to claim lack of possession or other inability to produce them.

Both United States v. Bryan, 339 U.S. 323 (1950) and United States v. Fleischman, 339 U.S. 349, 362-63 (1950) were criminal contempt proceedings where the court required the defendants to disprove the willfullness element of contempt by demonstrating attempts to comply with the order.

In Oriel v. Russell, 278 U.S. 358, 361,366 (1929) the alleged contemner never raised a Fifth Amendment claim and the court found that there was sufficient evidence introduced to overcome his denials of possession.

In United States v. Hankins, 565 F.2d 1344,1348 (5th Cir. 1978), opinion clarified and rehearing denied, 581 F.2d 431, cert. denied 440 U.S. 909 (1979), the defendant never tendered the issue of inability to comply because he stated only that he neither had, nor would produce the subpoenaed records.

In Sigety v. Abrams, 632 F.2d 969,974 (2d Cir. 1980) the trial court had actually required the prosecution to prove that the defendant had possession of the records and the Second Circuit found his Fifth Amendment claim untenable.

In United States v. Johnson, 247 F.2d 5, 7-8 (2d Cir.1957); cert. denied 355 U.S. 867(1957), the defendant was charged with criminal contempt and the court found that there was ample evidence that the subpoenaed records existed and could be produced.

Lopiparo V. United States, 216 F.2d 87 (1954) was decided before this Court's decision in Curcio and would be overruled on that basis today.

8) Petitioners analogize the defendant's dilemma to that faced in McGautha v. California, 402 U.S. 183 (1971). The analogy is misplaced. Defendant Crampton was faced with the choice in a single phase murder trial of remaining silent and incurring a severe penalty, or testifying as to mitigating factors but possibl incriminating himself on the merits. Unlike Rylander, Crampton was not faced with the certainty of contempt or self-incrimination, whereby a waiver of his Fifth Amendment privilege would be compelled. Rather, he faced the purely voluntary, tactical choice of deciding whether it was more valuable to testify or remain silent.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am a resident of the county aforesaid; I am over the age of eighteen (18) years and not a party to the within entitled action; my business address is 2220 K Street, Sacramento, CA. 95816.

On March 24, 1982 , I served the within OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail address as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Joan Van Den Berg
Special Agent IRS
801 Eye Street
P.O. Box 1312
Sacramento, CA 95806

Supreme Court of the United States
Washington, D.C. 20543

Pursuant to Rule 28, all parties required to be served, have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 24, 1982 at Sacramento, CA.

Joseph F. Harbison III

JOSEPH F. HARBISON, III

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1120

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT,

PETITIONERS

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC. AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, RICHARD W. RYLANDER, SR., pursuant to Rule 46 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Petitioner was represented by appointed counsel in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

JOSEPH F. HARBISON, III, as a member of the Federal Defenders Panel for the Eastern District, represented petitioner in the Federal District Court actions Nos. S-79-570, S-79-571 (civil contempt) which corresponds to 9th Circuit Docket Nos. 80-4594, 80-4595. The 9th Circuit decision in that case is the subject of the Solicitor General's petition to this Court for a Writ of Certiorari, Case No. 81-1120. (counsel has now been appointed to represent petitioner before this court as well).

Further, petitioner was represented by the same attorney in District Court No. CR-S-80-44, criminal contempt, which corresponds to the 9th Circuit Docket Nos. 80-1813, 80-1702, 80-1703. Petitioner proceeded in forma pauperis on that appeal, by District Court orders of November 21, 1980 and December 11, 1980. (see Excerpt, page 145, 9th Circuit Docket Nos. 80-4594 and 80-4595).

DATED: March 24, 1982

Respectfully submitted,

CLARK & HARBISON

By: Joseph P. Harbison III

JOSEPH P. HARBISON, III
P.O. Box 160327
Sacramento, CA 95816

Petitioner's
Reply Brief

Supreme Court, U.S.
FILED

APR 6 1982

ALEXANDER L. STEVAS
CLERK

No. 81-1120

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT, PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1120

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT, PETITIONERS

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC. AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

REPLY MEMORANDUM FOR THE UNITED STATES

In opposing our petition, respondent offers no valid reason for denying certiorari. He has instead confused the issues presented in a manner that makes appropriate this reply.[1]

1. Respondent (Br. in Opp. 4-6) perpetuates the error of the court of appeals (Pet. App. 6a-7a) in arguing that res

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[1] On March 3, 1982, subsequent to the filing of our petition for a writ of certiorari, respondent was indicted by a grand jury in the Eastern District of California for willfully failing to file income tax returns for the years 1975 through 1977, in violation of 26 U.S.C. 7203 (*United States* v. *Rylander*, CV. No. 5-82-50 (E.D. Cal.)). That indictment has no bearing on the petition since the information respondent was ordered to produce in this case is still necessary to determine his correct tax liabilities for those and other taxable years.

judicata does not preclude him from asserting, at the contempt hearing, his inability to comply with the production order. He does not, however, address the res judicata effect of the summons enforcement order as conclusively establishing respondent's possession of and ability to produce the records *at the time that order was entered* (Pet. 11-12). This established fact formed the basis for the presumption in the later contempt proceeding that respondent continued to possess the records from the date of the enforcement order to the time of the contempt hearing.

Respondent urges, however, that his possession of the documents was not established by the prior proceeding and that, therefore, by merely raising the issue at the contempt hearing and making a conclusory denial of possession, respondent shifted the burden to the government to prove the records could be produced. To the contrary, the presumption of continuing possession, together with the government's showing that respondent had failed to produce the records as ordered, plainly required respondent to explain or justify his failure to comply with the court's order. Accordingly, the court of appeals' refusal to require respondent to present credible evidence to meet that burden is in conflict with this Court's decision in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948), and the decision in *United States* v. *Hankins*, 565 F. 2d 1344, 1351 (5th Cir.), opinion clarified and rehearing denied, 581 F. 2d 431, 437 (1978), cert. denied, 440 U.S. 909 (1979).[2]

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[2] In *Hankins*, the contemnor sought to testify at his contempt hearing that he could not produce the records at the time the summons was issued (and thus could not be compelled to testify as to their whereabouts). The court of appeals (581 F. 2d at 437, n.8) rejected that contention, quoting *Maggio* v. *Zeitz*, *supra*, and held that Hankins could not litigate in the contempt proceeding his ability to produce the records at times prior to the date of the production order.

2. Respondent wholly miscomprehends the scope and thrust of the Fifth Amendment privilege against self-incrimination. In *Curcio* v. *United States*, 354 U.S. 118, 123 (1957), this Court held that the custodian of corporate records subpoenaed to appear before a grand jury may be compelled to produce the records and give testimony "ancillary to production" necessary to authenticate and identify them. It also held the custodian could not be compelled to incriminate himself. *Curcio* does not, however, impose any duty to testify on a custodian of corporate records who *refuses* to produce records and in no way sanctions the proposition that such a custodian may overcome his burden of proof with untested oaths coupled with claims of Fifth Amendment privilege.[3]

Respondent assumes (Br. in Opp. 8-9) that his sworn statement denying possession of the records was compelled (as testimony ancillary to nonproduction) and thus did not constitute a waiver of the privilege for purposes of cross-examination.[4] But respondent fails to appreciate that the order directing him to "show cause" why he should not be held in contempt for failing to produce documents required him to present credible evidence justifying his refusal to comply with the production order. *United States* v. *Hankins, supra; McPhaul* v. *United States*, 364 U.S. 372 (1960); *United States* v. *Fleischman*, 339 U.S. 349 (1950). And, as the court held in *Hankins*, a sworn statement upon which the declarant refuses to be cross-examined is not competent evidence. 565 F. 2d at 1351; 581 F. 2d at 437; *Hankins* v. *Bell*, 473 F. Supp. 453 (N.D. Miss. 1979), aff'd *sub nom. Hankins* v. *Civiletti*, 614 F. 2d 953 (1980). That holding is squarely in conflict with the decision below.

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[3] Such a construction of *Curcio* was adopted in *United States* v. *O'Henry's Film Works, Inc.*, 598 F. 2d 313 (2d Cir. 1979). But the rule of *O'Henry's Film Works* advanced by respondent has little to commend it and in fact is contrary to *Curcio*. See *Sigety* v. *Abrams*, 632 F. 2d 969 (2d Cir. 1980).

[4] Respondent's reliance (Br. in Opp. 7 [illegible] on *United States* v. *Hansen Niederhauser Co.*, 522 F. 2d 1037, 104[illegible] (10th Cir. 1975), is misplaced. There, the district court did not held a hearing and ordered the respondent held in contempt if he did not comply with the production order. In that circumstance, the court of appeals ruled a hearing was necessary to permit the respondent to prove his inability to comply with the production order. Respondent here had such an opportunity at the summons enforcement proceeding, but chose not to avail himself of that opportunity. While the court in *Hansen Niederhauser* also noted that the government must make "some showing regarding the existence of the records" (*ibid.*) to put the respondent to his proof, respondent's failure to appear at the enforcement hearing and to contest the issue of the records' existence distinguishes this case from *Hansen Niederhauser* on this issue. In any event, as noted in our petition (Pet. 4-5), the

3. Respondent concedes (Br. in Opp. 11, n.6) that the decision in *United States* v. *Meeks*, 642 F. 2d 733 (5th Cir. 1981), petition for cert. pending, No. 81-1063 (filed Dec. 7, 1981), precludes the imposition of contempt sanctions against any individual who asserts an inability to comply with a production order and raises a claim of Fifth Amendment privilege as to any other testimony. Other than to assert—without explanation—that the decision in *Meeks* "goes considerably beyond" the holding of the court below (Br. in Opp. 11, n.6), respondent does not attempt to distinguish this case from *Meeks*. But the result in this case does not differ from that in *Meeks*, and both decisions are in square conflict with *Hankins, supra*, in result and rationale. The decision below alters the burden of proof in civil contempt cases and carves out an exception to the rules of evidence. Those holdings are in conflict with the decisions cited in this memorandum and in our petition, and are of such importance to the administration of the revenue laws that certiorari is clearly warranted.

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government made an offer of proof at the enforcement hearing from which the district court concluded that respondent had possession of the summoned records.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

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Petitioner’s Brief

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No. 81-1120

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA and
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COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a respondent in a civil contempt proceeding, who has failed to obey a final order of the court directing him to comply with Internal Revenue Service summonses, may sustain his burden of establishing an inability to comply by submitting an untimely and uncross-examined statement that he does not have the summoned documents and asserting his Fifth Amendment privilege against self-incrimination.

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The respondent in this civil contempt proceeding, who failed to obey a final order of the court directing him to comply with Internal Revenue Service summonses, did not sustain his burden of establishing an inability to comply by simply submitting an untimely and uncross-examined statement that he did not have the summoned documents and asserting his Fifth Amendment privilege against self-incrimination 14

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 656 F.2d 1313. The opinion of the district court (Pet. App. 14a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1981. On November 23, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including

December 18, 1981. The petition was filed on December 15, 1981, and was granted on April 26, 1982 (J.A. 104). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * compelled in any criminal case to be a witness against himself * * *.

26 U.S.C. 7402(b) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

STATEMENT

1. In connection with an Internal Revenue Service (IRS) investigation of the tax liabilities of respondent Richard W. Rylander, Sr., for the years

1973 through 1977, the IRS, on January 4, 1979, issued summonses to respondent, as president of Rylander & Co. Realtors, Inc. (Rylander & Co.), and as president of Affiliated Investments and Mortgage Company, dba AIM Real Estate Marketing and Counselling (AIM), to testify and to produce books and records of those corporations[1] (Pet. App. 2a). When respondent failed to comply, the United States and Joan M. Van Den Berg, Special Agent of the IRS, petitioned the United States District Court for the Eastern District of California for enforcement of the summonses, pursuant to 26 U.S.C. 7402(b) and 7604(a) (J.A. 4-7). On August 13, 1979, the district court ordered respondent to show cause why he should not testify and produce the records as set forth in the summonses. Respondent, however, evaded service of these and subsequent orders and it was not until after a fourth set of orders to show cause was issued in November 1979 (J.A. 17-19) that the United States Marshal's office was finally able to effect personal service on the respondent on November 30, 1979 (J.A. 90).

In those orders, the district court directed respondent to appear before it on January 14, 1980, to show cause why he should not be compelled to testify and to produce the records sought in the IRS summonses.

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[1] Subsequent to the filing of our petition for a writ of certiorari, respondent was indicted for willfully failing to file income tax returns for the years 1975 through 1977, in violation of 26 U.S.C. 7203 (*United States* v. *Rylander*, CV. No. 5-82-50 (E.D. Cal. Mar. 3, 1982)). That indictment has no bearing on this case since the information respondent was summoned to produce is still necessary to determine his correct tax liabilities for those and other years. Department of Justice records indicate that the Service's recommendation for criminal prosecution was not made until May 22, 1981, long after the issuance of the summonses in this case.

The orders further directed respondent to serve a written response to the petition within 10 days of service and also provided that "[o]nly those issues * * * brought into controversy * * * will be considered at the return of this Order and any uncontested allegation in the Petition will be considered admitted" (J.A. 31). Despite these directives from the court, respondent failed to file any response other than a letter to the Deputy United States Marshal, in which he claimed that he was not the president of the subject corporations and, therefore, had been improperly served (Pet. App. 15a; J.A. 21-25). The same letter was attached to an unsworn declaration respondent submitted to the court on January 9, 1980, in which he stated that he was not the president of either corporation, was not the president at the time of issuance of the summonses, and was not associated with either corporation (J.A. 20). He filed no other written response to the orders to show cause nor did he or any other corporate representative appear at the enforcement hearing (Pet. App. 15a).

In view of respondent's letter, government counsel made an offer of proof at the enforcement hearing with regard to Rylander's relationship to the corporations and their status as viable entities (J.A. 46-51). The offer of proof established, *inter alia*, that Rylander & Co. was incorporated as a California corporation on April 1, 1969; that respondent opened a checking account at the Security Pacific Bank as president of Rylander & Co. and wrote checks on that account; that federal income tax returns for the company's 1972 and 1973 fiscal years were signed by respondent, as president of Rylander & Co.; that respondent signed a purchase agreement as president of Rylander & Co., purporting to sell all of its assets to AIM; and that the California Secretary of

State's office had no record of dissolution of the corporation (J.A. 47-48).

An offer of proof also was made with respect to AIM. It showed, *inter alia*, that AIM was incorporated in California on July 18, 1972; that respondent was listed as one of its three directors; that AIM's federal income tax returns for fiscal years 1972 and 1973 were signed by respondent, as president; that respondent, as president, signed a fictitious name statement filed with the County of Sacramento; that respondent was the only authorized signatory for an account he opened for AIM with the Security Pacific Bank; that respondent was the president and agent of AIM for service of process; that respondent, as president, signed an application for a real estate corporation license with the California State Real Estate Board; and that there was no record in the Secretary of State's office indicating dissolution of the corporation (J.A. 50). Agent Van Den Berg stated under oath that, if called, she would testify as to the truth of these matters with regard to both Rylander & Co. and AIM (*ibid.*). Following this offer of proof, the court indicated it was satisfied that there was sufficient evidence that respondent was president of the corporations at all times relevant to the service upon respondent (*ibid.*).

2. On January 15, 1980, the court issued an order enforcing the summonses. The order required respondent to appear before the IRS agent on February 4, 1980, and to produce for inspection and copying the records and documents of Rylander & Co. and AIM, as set forth in the summonses (Pet. App. 26a-28a).[2] Respondent was personally served with the

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[2] Respondent did not appeal from the order enforcing the summonses (Pet. App. 18a).

order on January 27, 1980 (Pet. App. 16a). Although he met with Agent Van Den Berg on February 4, 1980, he failed to produce any documents (Pet. App. 2a, 16a). The government subsequently petitioned the district court for orders to show cause why respondent should not be held in contempt (Pet. App. 3a, 16a). Several show cause orders were issued, but numerous attempts by the United States Marshal to serve the respondent personally were unsuccessful (Pet. App. 3a, 16a). The court eventually determined that constructive service had been accomplished and that respondent was avoiding personal service (Tr. 20; Pet. App. 16a).[3] It therefore issued a bench warrant resulting in respondent's arrest on July 11, 1980 (Pet. App. 3a, 16a).

3. The show cause hearing was held on October 8, 1980, with respondent in attendance.[4] Without conceding that the respondent had met his burden of proving a defense, the government attempted at the hearing to adduce evidence of respondent's ability to comply (Tr. 128). The government called as witnesses two corporate officers of Rylander & Co. and AIM, with the following results: one witness, re-

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[3] The record reflects that at least six attempts were made by the marshal's office to serve respondent personally. Therefore, the court provided for constructive service and copies of the order to show cause were mailed to respondent's address (Tr. 19-20).

[4] Respondent was not represented by counsel at the hearing. He had twice previously dismissed appointed counsel, had refused to retain private counsel, and had clearly stated that he wished to proceed without counsel (Pet. App. 3a n.2). His participation in the hearing consisted largely of repeated demands that the district judge recuse himself and denials of the court's jurisdiction (see, *e.g.*, Tr. 54, 58-59, 104, 140, 266; see also Pet. App. 14a).

spondent's son, asserted his Fifth Amendment privilege to all but rudimentary questions; the other stated that he was not in fact an officer of the corporations; and there was evidence that both witnesses had been ordered by respondent not to comply with production orders (Tr. 167, 235-236; J.A. 84, 89).

Respondent did not offer any evidence at the contempt hearing (Pet. App. 18a). Based on the record before it, the district court found that respondent had failed to comply with a valid court order and found him in civil contempt (J.A. 94).[5] Respondent was accordingly remanded to the custody of the Attorney General "until such time as he purges himself of that contempt" (Tr. 262). The court indicated that respondent could purge himself either (1) by complying with the court's order of January 15, 1980, directing him to produce the summoned records or (2) by demonstrating his inability to produce them (Tr. 262-263).

Immediately after announcing its decision, the court—as it had on numerous occasions during the hearing—inquired whether respondent was willing to testify why he could not produce the summoned records and thereby purge himself of contempt (J.A. 58). When respondent indicated that he would testify (*ibid.*), government counsel informed the court that if respondent took the stand the government would seek to cross-examine him (J.A. 59). At this point, the court adjourned the purge hearing until the following day in order that an attorney could be appointed to represent respondent (Tr. 264-267).[6]

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[5] Respondent was also found to be in criminal contempt for failing to produce documents pursuant to the order of the district court enforcing the summonses and for failing to appear at a March 24, 1980, show cause hearing. An appeal of the criminal contempt conviction is pending before the Ninth Circuit (Nos. 80-1813, 80-1702 and 80-1703). That case was argued on June 9, 1981.

Prior to the resumption of the purge hearing, however, respondent submitted a written statement entitled "Oath in Purgation of Contempt and Release of Records" (J.A. 91-92; Tr. 273-275, 279-280). This declaration stated in part, "I swear on oath that I have no such records as called for in the Court's Order of January 16, 1980." When this statement was brought to the court's attention, it ordered the purge hearing continued until October 23, 1980, to allow appointed counsel additional time to prepare (Pet. App. 4a; Tr. 280-287).

When the hearing reconvened respondent took the stand and verified that he had submitted a statement indicating that he did not have the records (Tr. 323). He refused, however, to answer any questions as to the whereabouts of the summoned documents, asserting the Fifth Amendment privilege against self-incrimination (*ibid.*). At that point, the government moved to strike his written declaration on the ground that it was denied the opportunity to cross-examine with regard to its contents (Tr. 324).[7]

The following day, on October 24, 1980, the district court issued Findings of Fact and Conclusions of Law in which it found that respondent, as president or other officer of the subject corporations, had possession or control, or both, of the books and records of the corporations (Pet. App. 17a). It further held that the burden of proof was on respondent to show why he could not comply with the court's order enforcing the summonses and that he had failed to introduce any evidence on this subject at the contempt trial (*id.* at 18a). Accordingly, the court found respondent in contempt for failing to comply with the enforcement order.[8]

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[6] This appointment of counsel was made at the suggestion of the court. Although respondent had twice previously dismissed appointed counsel, he indicated at that time that he would accept the services of counsel (Pet. App. 21a-22a; Tr. 264, 273, 284-285; see note 4, *supra*).

[7] The court denied the government's motion to strike respondent's affidavit (Tr. 323), but later decided it would take the motion under submission (Tr. 324; Pet. App. 22a). It never specifically ruled on the motion thereafter.

4. The court of appeals reversed without hearing oral argument (Pet. App. 1a-11a). The court first rejected the government's contention that respondent should be estopped in the contempt proceeding, by application of the doctrine of res judicata, from litigating the issue of his ability to produce the records at the time the enforcement order was entered. Relying on the summary nature of enforcement proceedings and the absence of an express finding in the enforcement order that respondent had possession of the documents, the court ruled that respondent could raise nonpossession as a defense to contempt (*id.* at 6a-7a).

The court of appeals further held that respondent's written statement that the documents were not in his possession or under his control was sufficient to meet his burden of proving his inability to comply with the order to produce and, in view of his claim that any further testimony might incriminate him, he could interpose his claim of Fifth Amendment privilege as a bar to cross-examination on the contents of his statement (Pet. App. 10a). Finally, the court concluded that under these circumstances the government must bear the burden of proving that the documents in question exist and are in respondent's possession or control (*id.* at 10a-11a).

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[8] The court had earlier indicated that respondent did not insulate himself from cross-examination merely by filing an affidavit. It determined that if he so chose, he could rely on the affidavit, dispense with direct examination and then submit to cross-examination by the government (Tr. 281). However, the court observed that the government had proven that the documents should exist and likely did exist and that the most logical place for them was with respondent (Tr. 353-354).

Judge Norris concurred in a separate opinion. He found it unnecessary to adjudicate the consequences of respondent's assertion of the Fifth Amendment privilege; rather, he considered respondent's written declaration sufficiently detailed to prove an inability to comply (Pet. App. 12a-13a).

SUMMARY OF ARGUMENT

1. This case has its genesis in the issuance of Internal Revenue Service summonses to respondent to produce books and records of two corporations in which he held the office of president. Respondent not only refused to comply with the summonses but also failed to assert any defenses for resisting production. Following a hearing and a final, appealable order directing him to produce the summoned records, and a second hearing at which he was adjudged in contempt, respondent asserted to the court for the first time that he could not produce any of the summoned records and that any further statement might incriminate him.

The court of appeals concluded that respondent's burden of proving his inability to comply could be met in the contempt proceedings by a mere denial that he possessed the records, coupled with an assertion of the Fifth Amendment privilege against self-incrimination.

In so holding, the court created an exception to the established rule regarding the burden of proof in contempt cases, solely by reason of respondent's invocation of the Fifth Amendment privilege.

The holding of the court of appeals would greatly hamper the IRS's ability to fulfill its statutory mandate to enforce the internal revenue laws. The adverse consequences of this decision, moreover, would not be limited to tax cases; its rationale would provide a clearly defined checklist for disobedience of any administrative or judicial order to produce unprivileged records. If investigations can be foreclosed by a simple (and belated) denial of one's ability to comply, accompanied by an assertion of the Fifth Amendment privilege, administrative summonses, grand jury subpoenas, and turnover orders can be ignored with impunity.

2. An individual ordered to respond to a summons or subpoena to produce books and records must either produce the requested documents or present defenses justifying his failure to do so. To be sure, an inability to comply is a complete defense to a summons; but that defense must be raised in a timely fashion. By timely raising defenses, a witness allows the issues to be addressed at an appropriate stage in the proceedings. If a summoned party does not raise the question of his ability to comply during a summons enforcement hearing, the court is entitled to presume that he can comply, and its enforcement order therefore establishes that the witness can produce the records. The enforcement order is final and appealable and is not subject to subsequent, collateral challenge.

3. The entry of the enforcement orders here not only established that respondent possessed the corpo-

rate records, it also gave rise to a presumption that the records continued to exist and that they remained in respondent's possession. Respondent in this case has never offered evidence to defeat the presumption upon which the government is, accordingly, entitled to rely.

4. Evidence introduced at a contempt hearing demonstrating that an alleged contemnor has failed to comply with a court order establishes a prima facie case of contempt. The burden then shifts to the alleged contemnor to go forward and to demonstrate by clear and convincing proof why he should not be held in contempt. The imposition of this burden is especially appropriate where, as here, any purported reasons for not complying with the court's orders are solely within the knowledge of the alleged contemnor.

Although the court of appeals recognized that respondent must initially bear the burden of proving his defense, it held that respondent's submission of a written statement, coupled with a Fifth Amendment claim, sufficed to meet this burden. This holding altered the established rule regarding the burden of proof in contempt cases. It transformed respondent's self-serving statement—which was not submitted until after the contempt hearing had been concluded and which was never subjected to cross-examination—into evidence deemed sufficient to sustain the substantial burden of establishing inability to comply at the contempt stage. Contrary to the court of appeals' conclusion, the prior decisions of this Court and other courts of appeals provide no basis for holding that a naked claim of privilege can shift the burden of proof in a contempt proceeding.

5. The construction of the privilege adopted by the court of appeals relieves the respondent of all risk and

all obligation. By construing the Fifth Amendment privilege to prohibit any inquiry after its invocation, the court has concluded that a sworn denial of possession followed by a claim of privilege must be accepted as establishing compliance with the summons. This erroneous conclusion was based on the insupportable assumption that the only course available to respondent in order to purge his contempt was to forgo his Fifth Amendment privilege. This is simply not the case. Respondent had at least three alternatives: (1) to produce the documents that the district court found to exist, (2) to prove his inability to comply by adducing credible evidence, *i.e.*, through the testimony of third parties, or (3) to take the stand and testify concerning the whereabouts of the documents and face cross-examination on that subject. He chose not to meet his burden but only to raise the issue by unverified denial.

6. Respondent's written statement was not evidence and therefore in no way satisfied his burden of proof. Conversely, if the statement was properly admitted as evidence, then respondent waived his Fifth Amendment privilege and should have been compelled to submit to cross-examination as to subjects raised in the statement.

The decision below allows respondent to have it both ways: his uncross-examined statement, coupled with his assertion of the privilege against self-incrimination, has been held to satisfy his burden of proof and to block further inquiry by the government. In effect, then, the respondent can stymie the government's investigation with impunity despite his failure to meet the burden imposed upon him by decisions of this Court.

ARGUMENT

THE RESPONDENT IN THIS CIVIL CONTEMPT PROCEEDING, WHO FAILED TO OBEY A FINAL ORDER OF THE COURT DIRECTING HIM TO COMPLY WITH INTERNAL REVENUE SERVICE SUMMONSES, DID NOT SUSTAIN HIS BURDEN OF ESTABLISHING AN INABILITY TO COMPLY BY SIMPLY SUBMITTING AN UNTIMELY AND UNCROSS-EXAMINED STATEMENT THAT HE DID NOT HAVE THE SUMMONED DOCUMENTS AND ASSERTING HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The government's orderly efforts to obtain non-privileged corporate records [9] in this case have been frustrated by respondent's tactics of evasion. From the start of this process, respondent had every opportunity to present all defenses to compliance he could muster; rather than offer those defenses at appropriate times and in a proper manner, respondent opted instead to engage in a protracted series of ploys that resulted in the district court's adjudication of civil contempt. First, he made the wholly specious suggestion that he was not president of the corporations; this the government rebutted at the enforcement hearing respondent chose not to attend. Next, he avoided personal service of a series of orders to show cause. When he was eventually tried for civil contempt for failure to comply with the court's enforcement orders, respondent chose to present no evidence whatsoever; his participation in the contempt hearing consisted of frivolous challenges to the court's jurisdiction. In addition, he took affirmative steps to block the government from obtaining records from other corporate officers.

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[9] A corporate officer has a duty to produce corporate records and can assert no personal Fifth Amendment privilege to defeat production. *E.g., Wilson* v. *United States*, 221 U.S. 361 (1911); *United States* v. *White*, 322 U.S. 694 (1944); *Bellis* v. *United States*, 417 U.S. 85 (1974).

In the face of this intransigence, the government and the district court proceeded patiently and deliberately, affording respondent many more opportunities than he was entitled to in order to state and prove his case. Respondent refused. Finally, after he was found to be in civil contempt on the basis of overwhelming and unrebutted evidence, respondent drew the last arrow from his quiver of tactics: in an attempt to purge himself of contempt, respondent asserted to the court for the first time that he was unable to comply. He did this by filing a self-serving, conclusory statement denying possession of the records and simultaneously refusing to be cross-examined on the very subject he belatedly raised. Against the backdrop of respondent's longstanding resistance to lawful process, the district court properly rejected respondent's untimely and unpersuasive submission and concluded that the contempt had not been purged.

In reversing the finding of civil contempt, the court of appeals reached a conclusion at odds with the decisions of this Court and other courts of appeals. The decision below, which misconstrued in fundamental ways the proceedings in the district court, not only rewards respondent's unjustified intransigence, but also provides a roadmap for avoidance of any lawful process.

A. An individual directed to respond to a summons or subpoena to produce books and records must either produce the requested documents or present defenses establishing his inability to comply

The United States has a system of taxation that relies on self assessment and the good faith and integrity of each taxpayer to disclose completely and honestly all information relevant to his tax liability. Nonetheless, "it would be naive to ignore the reality that some persons attempt to outwit the system." *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975). Thus, Congress has recognized that the tax laws are not entirely self-enforcing and, in Section 7801 of the Internal Revenue Code, 26 U.S.C. 7801, has charged the Department of the Treasury with the duty to administer and enforce the internal revenue laws.

Section 7602 of the Code provides the Treasury's principal information gathering mechanism, authorizing the Secretary of the Treasury or his delegate to examine records, to summon the submission of books and records, and to take testimony relevant to an inquiry as to the correctness of any return, for the purpose of making a return where none has been made, and for determining the liability of any person for any internal revenue tax. An IRS summons can be enforced only by invocation of the process of the court, pursuant to Sections 7402 and 7604 (26 U.S.C. (& Supp. IV)). *Reisman* v. *Caplin*, 375 U.S. 440 (1964). To obtain enforcement of a summons, the government must first establish, as it did here, that the summons was issued for a proper purpose, that the material sought is relevant to that purpose, that the information sought is not already in the Commissioner's possession, and that the administrative steps required by the Internal Revenue Code have been followed. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

As it did here, the government generally makes the materiality and relevancy showing required by *Powell* in its petition to enforce the summons and the accompanying affidavit or declaration of the IRS agent. *United States* v. *Kis*, 658 F.2d 526, 536 (7th Cir. 1981), cert. denied, No. 81-1272 (Mar. 22, 1982); *United States* v. *Moon*, 616 F.2d 1043 (8th Cir. 1980); *United States* v. *Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979); *United States* v. *Newman*, 441 F.2d 165 (5th Cir. 1971). The issuance of an order to show cause puts the summoned party on notice that the requirements of *Powell* have been met and shifts to the summoned party the burden of showing "substantial deficiencies in the summons proceedings," as justification for not enforcing the summons. *United States* v. *Newman*, *supra*, 441 F.2d at 169 (footnote omitted); *United States* v. *Zack*, 521 F.2d 1366, 1368 (9th Cir. 1975). See also *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978); *United States* v. *Holmes*, 614 F.2d 985, 988 (5th Cir. 1980); *United States* v. *Moon*, *supra*, 616 F.2d at 1046; *United States* v. *Garden State National Bank*, *supra*, 607 F.2d at 68; *United States* v. *Moll*, 602 F.2d 134, 138 (7th Cir. 1979).

At that time the summoned party must assert any and all defenses he has to the summons. *United States* v. *Newman*, *supra*; *United States* v. *McCarthy*, 514 F.2d 368 (3d Cir. 1975). Although the case law envisions a summons enforcement proceeding to be of a summary nature, *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971), this in no way diminishes the significance of the adversary hearing to which the taxpayer is entitled before enforcement is ordered.[10] *United States* v. *Powell, supra,* 379 U.S. at 58. At the hearing, the taxpayer may contest the summons on any appropriate ground. *Reisman* v. *Caplin, supra,* 375 U.S. at 449. The burden of challenging the summons, however, rests with the taxpayer, *United States* v. *Powell, supra,* who is afforded the right to a judicial determination of any challenges to the summons. *Reisman* v. *Caplin, supra*; *United States* v. *Euge,* 444 U.S. 707, 719 (1980). For example, if a summoned witness raises and proves the non-existence or his lack of control of the records, he has established an absolute defense. *United States* v. *Bryan,* 339 U.S. 323, 330-331 (1950); *United States* v. *Asay,* 614 F.2d 655, 660 (9th Cir. 1980). In the absence or failure of such proof, the entry of an order enforcing the summons becomes a final, appealable order, *Reisman* v. *Caplin, supra,* 375 U.S. at 449, that bars the taxpayer from relitigating whether he had possession and control of the summoned records when the enforcement order was entered. *Maggio* v. *Zeitz,* 333 U.S. 56, 75-76 (1948); *United States* v. *Peter,* 479 F.2d 147 (6th Cir. 1973); *United States* v. *Secor,* 476 F.2d 766 (2d Cir. 1973).

This Court has recognized that by raising defenses on a timely basis a witness not only demonstrates a proper respect for the legal process, but also allows those defenses to be addressed at an appropriate time. *United States* v. *Bryan, supra,* 339 U.S. at

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[10] When a summons is challenged, it must be scrutinized by the court to determine whether it was issued for a proper purpose, and was not meant "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States* v. *Powell, supra,* 379 U.S. at 58.

332-333; *United States* v. *Fleischman*, 339 U.S. 349, 352 (1950); cf. *Fisher* v. *United States*, 425 U.S. 391, 395 (1976). If a summoned party does not, however, raise the question of his ability to comply at the appropriate proceeding, the court is entitled to presume he can comply and the court's enforcement order conclusively establishes that the witness can produce the records. *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 74.

Respondent failed to raise any colorable defenses to enforcement of the summonses.[11] Nevertheless, the government established by an offer of proof that respondent was the president of both corporations whose records were summoned and, in that capacity, had conducted numerous transactions on behalf of the corporations. Respondent had an absolute right to contest those summonses at the enforcement proceeding. However, despite notice and a hearing he failed even to appear, thereby forgoing the opportunity to assert his constitutional rights or any factual defenses, such as an inability to comply. *Reisman* v. *Caplin*, *supra*; *United States* v. *Euge*, 444 U.S. 707, 719 (1980); *United States* v. *Secor*, *supra*.

The orders issued by the district court following that hearing directed respondent to comply with the summonses by producing the documents set forth therein. These became final, appealable orders upon their entry. *United States* v. *Asay*, *supra*. Respondent, however, did not take an appeal from these orders, and therefore must be precluded by res judicata from later relitigating those issues determined by the district court's orders.

The opinion of the court of appeals, however, gives no effect to the orders enforcing the summonses. It thus is in conflict with the decision of this Court in *Maggio* v. *Zeitz, supra,*[12] and with the decisions of the Second and Sixth Circuits in *United States* v. *Secor, supra,* and *United States* v. *Peter, supra.* The court of appeals determined that because respondent did not appear and "actually litigate" (Pet. App. 7a & n.6) any defenses at the enforcement stage, he was not foreclosed at the contempt hearing from raising defenses that were available to him at that earlier time. In so holding, the court concluded that the enforcement proceeding did not result in a finding that respondent had the ability to comply with the summonses at that time (*id.* at 6a-7a).

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[11] Respondent's letter to the court (J.A. 20-25) refers only to the specious contention that he was not president of the corporations whose records were sought.

This holding ignores the orders of the district court enforcing the summonses and the facts surrounding the entry of those orders. Although the orders did not explicitly state that respondent was able to comply, implicit in such enforcement orders is a determination that respondent did, in fact, have the records sought. See *Clinkenbeard* v. *Central Southwest Oil Corp.*, 562 F.2d 649, 651 (5th Cir. 1976). Moreover, the district court's Findings of Fact and Conclusions of Law, entered after the contempt hearing, explicitly found that respondent had possession or control of the records at all relevant times (Pet. App.

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[12] *Maggio* v. *Zeitz, supra,* 333 U.S. at 69:

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

17a).[13] Inasmuch as there had been a final adjudication rejecting any defenses to the summonses, respondent cannot in the later contempt proceeding turn back the clock and try anew the question whether the underlying enforcement order should have been entered. To permit such a collateral attack would "make a mockery of the well settled doctrine of *res judicata.*" *United States* v. *Secor, supra,* 476 F.2d at 770.

The situation here is no different from that addressed in this Court's opinion in *Maggio* v. *Zeitz, supra,* a civil contempt proceeding arising from a bankrupt's failure to comply with a turnover order (333 U.S. at 75-76, footnote omitted):

> We agree with the Court of Appeals that the turnover order may not be attacked in the contempt proceedings because it is *res judicata* on this issue of possession at the time as of which it speaks. But application of that rule in these civil contempt cases means only that the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to

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[13] Contrary to the court of appeals' suggestion, the government does not argue that respondent is precluded from raising a *present* inability to comply with the summonses at the contempt proceeding. Rather, our contention is simply that the district court found that at the time of the enforcement hearing, respondent *did*, in fact, have the ability to comply. This finding created a presumption that respondent continued to possess the records. Hence, respondent had the burden of establishing at the contempt proceeding that he was currently unable to comply. See *Maggio* v. *Zeitz, supra,* 333 U.S. at 74-76; cf. *Restatement of the Law of Judgments* § 68 comment *q*, at 312-313 (1942); see also pages 23-26, *infra.*

comply. He cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession. Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by evidence or by his own denials which the court finds incredible in context.

B. The enforcement orders established the presumption that respondent continued to have possession or control of the records

Once the government established its prima facie case for enforcement of the summonses, the court's enforcement order gave rise to the presumption that the documents existed and that respondent continued to have possession or control of those documents. While this presumption is rebuttable, it cannot be overcome unless and until respondent submits clear and convincing evidence that the records have been destroyed or that he no longer has possession or control of them. *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 69-76; *Oriel* v. *Russell*, 278 U.S. 358, 366 (1929); *NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973); *Lopiparo* v. *United States*, 216 F.2d 87, 91 (8th Cir. 1954), cert. denied, 348 U.S. 916 (1955); *Sigety* v. *Abrams*, 632 F.2d 969, 974-975 (2d Cir. 1980).

In this case, respondent offered no evidence whatever at the contempt hearing. Under the governing decisional law he therefore failed to rebut the presumption. Hence, the contempt hearing ended just as it began—with the government entitled to rely on the presumption (buttressed by its proof at the enforcement hearing) that the documents existed and that respondent had them in his possession or control.

Because the court of appeals ignored this presumption, it misunderstood the nature of the evidence required at the contempt hearing. In the absence of any defense by respondent, the government was not required to adduce additional evidence to prove either that respondent possessed the documents at the time of the enforcement hearing or that respondent continued to be in possession. After all, the government cannot and should not be required to divine all unasserted defenses and respond to each of them. Yet, that is the inevitable result of the opinion below.

C. An alleged contemnor has the burden of establishing by clear and convincing evidence his inability to comply with a court order

Once the district court issued the order to show cause, the burden was placed on respondent to show why he should not be held in contempt (*McPhaul* v. *United States*, 364 U.S. 372, 379 (1960); *United States* v. *Fleischman*, 339 U.S. 349 (1950); *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934); *NLRB* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973)). In these circumstances, if an alleged contemnor does not rebut the prima facie showing of non-compliance, the evidence supporting the order to show cause establishes the contempt. If the respondent rebuts the showing, the moving party must then proceed and prove its case by clear and convincing evidence. *United States* v. *Rizzo*, 539 F.2d 458 (5th Cir. 1976); *United States* v. *Powers*, 629 F.2d 619, 626 n.6 (9th Cir. 1980).

Prior to the decision of the court of appeals in this case, no court had held that the petitioner in a contempt proceeding must establish the respondent's ability to comply. See, *e.g.*, *United States* v. *Fleischman*, *supra*, 339 U.S. at 362-363; *NLRB* v. *Trans Ocean Export Packing, Inc., supra*, 473 F.2d at 616. Rather, the burden was properly placed on the respondent to show categorically and in detail why he was unable to do so. *Ibid.; United States* v. *Hankins*, 565 F.2d 1344 (5th Cir.), opinion clarified and rehearing denied, 581 F.2d 431 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979); *United States* v. *Hansen Niederhauser Co.*, 522 F.2d 1037, 1040 (10th Cir. 1975).

This burden is especially appropriate where, as here, the purported reasons for not fully complying with the court's orders are solely within the knowledge of the alleged contemnor. In *United States* v. *Fleischman*, this Court discussed the burden of proof in contempt proceedings in language that is applicable here[14] (339 U.S. at 362-363):

> In this situation, manifestly, the prosecution is under a serious practical handicap if it must prove the negative proposition—that respondent did not or had no good reason for failing to try to comply with the subpoena insofar as she was able. The possibilities of time and circumstances are of such wide range as to defy inclusive rebuttal. On the other hand, the burden of the affirmative was not an oppressive one for respondent to undertake; the relevant facts are peculiarly within her knowledge. She was called upon merely to introduce evidence as to what steps she took after receiving the subpoena, or, if she took no action, any evidence tending to excuse her omission. Respondent does not lose the presumption of innocence that surrounds the defendant in a criminal prosecution. That pre-

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[14] *Fleischman* involved a criminal contempt of Congress. However, the respondent's burden of proving inability to comply should be no lower in a civil contempt case.

> sumption continues to operate until overcome by proof of guilt beyond a reasonable doubt and is not to be confused with burden of proof, which is a rule affecting merely the time and manner of proof.

The findings of fact of the district court established the existence of the books and records of the corporations and respondent's possession or control, or both, of those books and records (Pet. App. 17a). The presumption that the records are still in existence and that respondent continues to control and possess those records (see pages 22-23, *supra*) governs unless and until respondent meets his burden of conclusively demonstrating that the records have been destroyed or that he no longer has possession and control of them. *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 69-76; *Oriel* v. *Russell*, 278 U.S. 358, 366 (1929); *NLRB* v. *Trans Ocean Export Packing, Inc.*, *supra*, 473 F.2d at 616.

Although the court of appeals recognized that the burden of proof ordinarily shifts only after the respondent has made this showing, it held that respondent's submission of a written statement, coupled with a Fifth Amendment claim, satisfied his burden. By thus converting the assertion of the Fifth Amendment privilege from a shield to a sword helping to satisfy the claimant's own burden, the court created an unjustified exception to the established rule regarding the burden of proof in contempt cases. In nullifying respondent's burden, the court of appeals incorrectly placed on the government the burden of making an affirmative showing at the contempt hearing that respondent had possession or control of the corporate records—a defense respondent had never presented to the court prior to the adjudication of contempt.[15] This imposes an obligation on the government that is in conflict with the standard set forth in *United States v. Fleischman*, *supra*, a case in which this Court recognized that the government would be saddled with a serious practical handicap if it must prove a negative, *i.e.*, that respondent had no good reason for failing to comply. 339 U.S. at 362-363.

D. The exception to the established rules regarding the burden of proof and the competency of evidence carved out by the court of appeals is contrary to the decisions of this Court

The court of appeals perceived a conflict between respondent's assertion of the Fifth Amendment privilege and his burden of proving an inability to comply. In fact, there is no inevitable tension between the privilege and the burden. A witness who seeks to meet his burden of proving an inability to comply may do so in one of two ways: by presenting the testimony of others or by testifying himself. In this case, respondent chose not to use third party evidence.[16] Had he done so, respondent's Fifth Amendment rights would not have been implicated.

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[15] The court reached this conclusion despite the fact that respondent made no effort to present this defense to the district court until *after* he was adjudicated in contempt. The district court had clearly indicated that the contempt hearing had concluded and that any submission by respondent was on the question of purging the previously found contempt (J.A. 66-67). This was understood by respondent, who labeled his written statement an "Oath of Purgation of Contempt" (J.A. 91-92). Thus, whatever the significance of the written declaration in the purge hearing, the fact remains that respondent offered no defense or evidence at the contempt hearing (see Pet. App. 18a). For these reasons, the court of appeals' decision is erroneous even under the incorrect standard it applied. However, because the court decided the case as if respondent had made some showing at the contempt hearing, we will address the remaining issues in accordance with this factually inaccurate premise.

Only because respondent opted to rely on his own statement did the self-incrimination issue arise. There was no coercion from the government or the court;[17] it was respondent's voluntary act of submitting his written declaration that manufactured this issue.

Once respondent submitted his statement and asserted the privilege as a bar to cross-examination, the decisive question was whether the court was required to accept and credit the proffered excuse for noncompliance, thereby imposing on the government the burden of proving respondent's ability to comply. We submit the court of appeals erred in elevating the uncross-examined statement to the status of admissible evidence and further erred in ruling that respondent's manipulation of the judicial process could shift the burden of proof onto the government.

Under the decision below, witnesses who duplicate respondent's tactics will be rewarded for their gamesmanship. A witness who forthrightly presents a defense, unencumbered by assertions of privilege and based on evidence the court in its discretion chooses not to believe, may be held in contempt. Yet, witnesses such as respondent who offer no evidence, and who affirmatively thwart the government's efforts to obtain evidence from third parties or through cross-examination, are immunized from the consequences of their behavior.

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[16] In fact, respondent went further and blocked the government's efforts to obtain such evidence. Thus, there is no basis for the court of appeals' rejection (as "merely speculative") of the government's observation that third party evidence was available to respondent (Pet. App. 9a).

[17] The government has at no time contended that respondent must meet his burden by testifying. He was not, after all, held in contempt for refusing to testify, but rather for failing to produce records in compliance with the enforcement order. Accordingly, he was presented with a three-fold choice: to produce the documents, to adduce evidence of his inability to comply, or to be incarcerated for contempt. The manner in which he elected to proceed was his to choose.

1. In the context of a summons enforcement proceeding, a motion to quash a grand jury subpoena, a motion to compel civil discovery, or a proceeding to direct a bankrupt to turn over records to the trustee, the obligation rests with the respondent in each case to provide some defense or excuse, if he is to avoid entry of a production order. In each of these situations, the mere assertion of the privilege neither relieves the respondent of his burden of proving a defense nor does it require the trial judge to accept the bald assertion of an excuse if respondent refuses, for whatever reason, to establish his defense with admissible evidence.

The interest protected by the privilege has never been held to be absolute or of such magnitude that all inquiry of those claiming its protections may be foreclosed merely by its assertion. It is well established, even with respect to testimony, that the person claiming the privilege has some burden of presenting a sufficient factual basis so that the trier of fact can determine from "the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951). If the claim is made in response to questions seemingly innocuous on their face, the claimant must go further and provide evidence that there exists substantial danger of incrimination from the information sought from him. *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972); *Haner* v. *United States*, 440 U.S. 1308, 1309-1310 (1979) (Rehnquist, Circuit Justice). Although providing the facts necessary to establish the danger of incrimination may involve some risk that the claimant will be forced to disclose portions of the very information he seeks to protect, he nevertheless is forced to decide how much information to disclose, and to elect between disclosure and the risk that his claim will be rejected.

2. The construction of the privilege adopted by the court of appeals here, as well as by three other courts of appeals in similar fact situations, relieves the respondent of all risk and all obligation. See *United States* v. *Meeks*, 642 F.2d 733 (5th Cir. 1981), petition for cert. pending, No. 81-1063 (filed Dec. 7, 1981); *United States* v. *O'Henry's Film Works, Inc.*, 598 F.2d 313 (2d Cir. 1979); *Traub* v. *United States*, 232 F.2d 43 (D.C. Cir. 1955). By permitting the assertion of the privilege to prohibit all inquiry, these courts have held that a sworn denial of possession followed by a claim of privilege "must be accepted as establishing compliance with the subpoena." *Traub* v. *United States*, *supra*, 232 F.2d at 47; *United States* v. *Meeks*, *supra*, 642 F.2d at 734-735; *United States* v. *O'Henry's Film Works, Inc.*, *supra*, 598 F.2d at 318. The authority generally cited in support of that result is this Court's decision in *Curcio* v. *United States*, 354 U.S. 118 (1957). Far from mandating that result, however, the rationale of *Curcio* is to the contrary.

In *Curcio* this Court held that the custodian of union records could not be compelled to give testimony regarding the location, custody or control of the union records he had been subpoenaed to produce. Curcio had been served with two subpoenas—one requiring production of records and the other requiring his testimony. He refused to honor the subpoena duces tecum, and no attempt was made to compel him to do so. At his appearance in response to the subpoena ad testificandum he was asked a series of questions designed to ascertain the whereabouts and control of the records. Curcio refused to answer those questions on the ground that to do so would incriminate him. He was convicted of criminal contempt for his refusal. 354 U.S. at 120-121. This Court held that, even though Curcio's personal privilege did not permit him to refuse to produce the union records he held in a representative capacity, Curcio could not be compelled to give incriminating oral testimony (*id.* at 122, 128). In reaching this conclusion, the Court clearly distinguished the refusal to give testimony from the refusal to produce records. Thus, the Court observed that Curcio "might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*" (*id.* at 127 n.7), and that "[t]here is a great difference between" contempts for failure to produce records and for refusing to testify (*id.* at 127-128).

That difference was again apparent in *McPhaul* v. *United States*, 364 U.S. 372 (1960), in which this Court sustained a criminal contempt conviction for willful failure to comply with a subpoena issued by the House of Representatives. McPhaul had refused to produce subpoenaed records or to answer any questions concerning those records before a Subcommittee of the House. At his criminal contempt trial, McPhaul sought, for the first time, to interject the issue of his ability to comply with the subpoena. This Court held that since McPhaul had not raised the question before the House Subcommittee he bore the burden of proof on that issue at the trial. McPhaul's argument that he could not have raised his inability to comply before the Subcommittee because to do so would have resulted in a waiver of his privilege against self-incrimination was rejected as having "no merit" (364 U.S. at 380).

Together, *Curcio* and *McPhaul* require that an individual who seeks to excuse a failure to comply with a properly issued subpoena to produce records must establish his defense. The mere fact that he may incriminate himself if he chooses to prove his defense by his own testimony does not permit a witness to avoid the burden of proving his defense by some means. Moreover, neither *Curcio* nor *McPhaul* held that a person who has failed to produce records in response to a subpoena may defend against the subpoena, or against contempt for failing to comply, by asserting that an excuse exists, but that his privilege permits him to refuse to establish its particulars.

Thus, the privilege permits the witness to refuse to "utter * * * a single self-[in]criminating word" (*Wilson* v. *United States*, 221 U.S. 361, 385 (1911)) in explanation of his failure to produce subpoenaed records. By his silence, however, the individual who has failed to produce records runs the risk that contempt sanctions may be imposed for his default of the subpoena's command. *Curcio* v. *United States*, *supra*, 354 U.S. at 127-128 nn. 6 & 7. Similarly, the individual who seeks to justify his failure to produce documents will not be immunized by the privilege for his noncompliance. This principle has long been recognized by decisions rejecting the notion that the privilege protects the custodian of records from contempt for failure to comply with a subpoena, or permits him to avoid sanctions if he fails to provide a full justification for his default. *Sigety* v. *Abrams*, *supra*, 632 F.2d at 974-975; *United States* v. *Hankins*, *supra*, 565 F.2d at 1351-1352; *Presser* v. *United States*, 284 F.2d 233 (D.C. Cir. 1960), cert. denied, 365 U.S. 816 (1961); *United States* v. *Johnson*, 247 F.2d 5 (2d Cir.), cert. denied, 355 U.S. 867 (1957); *Lopiparo* v. *United States*, *supra*, 216 F.2d at 92.

3. The decision below and that of the Second Circuit in *United States* v. *O'Henry's Film Works, Inc.*, *supra*, misapplied these principles. Although *O'Henry's* arose in the context of a witness's duty to *testify* about unproduced documents, both decisions effectively permit a corporate officer subpoenaed to produce nonprivileged corporate records to excuse his failure to comply merely by stating that he is unable to do so and that further disclosures would incriminate him.

The issue presented in *O'Henry's* was whether a sworn denial of possession constituted a waiver of the corporate officer's privilege with respect to the location and custody of subpoenaed corporate records. The court held that the corporate officer's duty to produce nonprivileged corporate records was accompanied by a duty to deny possession, since such testimony was "auxiliary to his nonproduction" of those records. That testimony, the court reasoned (598 F.2d at 318), had been compelled from the respondent over his claim of privilege and thus did not constitute a waiver of his privilege. The court of appeals here (Pet. App. 10a) cited *O'Henry's*, but went a step further. It held that an assertion of nonpossession, together with a claim of privilege, precluded any further questioning and that respondent had thereby satisfied his burden of proving an inability to comply.

These conclusions cannot be reconciled with this Court's governing decisions. First, the holding of *O'Henry's* that the respondent can be compelled to give "testimony auxiliary to nonproduction" is based on an incorrect interpretation of *McPhaul* and *Curcio*. In *Curcio* v. *United States*, *supra*, 354 U.S. at 123-127, this Court flatly rejected the argument that testimony regarding nonprivileged records is not protected by the Self-Incrimination Clause and held "the Fifth Amendment suggests no such exception" to the prohibition against compelling *any* incriminating testimony. *Id.* at 123. Moreover, although the Second Circuit also relied on *McPhaul*,[18] that case simply cannot be construed to impose on the custodian of unprivileged records the duty to give sworn testimony regarding his ability to produce them. See *Fisher* v. *United States, supra,* 425 U.S. at 408-414.

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[18] Specifically, the Second Circuit noted (598 F.2d at 318) the following language in *McPhaul* (364 U.S. at 380): "Similarly, there is no merit in petitioner's argument that he could not have advised the Subcommittee that he was unable to produce the records without thereby inviting other questions respecting the records and thus risking waiver of his privilege against self-incrimination. See *Curcio* v. *United States*, 354 U.S. 118." This statement in *McPhaul* must be understood in its context. McPhaul argued that his refusal to produce the subpoenaed records could not be held to be criminally "willful" since he was privileged from answering questions with respect to his possession and control of the records, and thus the burden of providing an excuse for his default could not be placed on him. This Court rejected that contention. It concluded first that the argument had "no merit" and, then, in the next sentence (364 U.S. at 380) that McPhaul was not, by virtue of his privilege, excused "from asserting inability to produce the records [before the Subcommittee] if, at a later contempt trial for failure to produce the records, he expects to put the Government to proof on that matter."

Second, there is no justification for the court of appeals' holding that the privilege against self-incrimination required the lower court to accept respondent's self-serving denial as sufficient to satisfy his burden. While the privilege protects the custodian of corporate records from being compelled to give oral testimony that might incriminate him,[19] *Curcio* v. *United States, supra,* it does not relieve him of the burden of establishing his defense. Thus, the interests served by the privilege are not implicated when a witness who seeks to provide an excuse to a subpoena duces tecum is called upon to prove, like any other litigant, the facts necessary to establish his assertions. As several courts of appeals have correctly held, one who seeks to avoid the command to produce records must prove the validity of his excuse, and if he chooses to satisfy his burden by his own testimony, he must waive his privilege to permit full development of the facts. *United States* v. *Hankins, supra,* 565 F.2d at 1351, 581 F.2d at 437; *Presser* v. *United States, supra,* 284 F.2d at 235; *United*

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[19] Far from being the product of compulsion, the declaration filed by the respondent came as a total surprise to the government and the court (J.A. 59-60). It was submitted in order to avoid the consequences that would flow from silence. And such testimony—given to obtain a benefit or to avoid a detriment—is neither involuntary as a matter of law nor "*ipso facto* 'compelled' within the meaning of the Self-Incrimination Clause." *McGautha* v. *California,* 402 U.S. 183, 212 (1971); *Simmons* v. *United States,* 390 U.S. 377, 393-394 (1968).

States v. *Johnson, supra*, 247 F.2d at 8; *Lopiparo* v. *United States, supra*, 216 F.2d at 92.[20]

4. The court of appeals erroneously viewed this case as one requiring respondent to choose between contempt for failing to produce and waiver of the privilege by explaining his nonproduction. Even if that situation were present, it would provide no justification for the court's holding. To be sure, a party in that situation would have a difficult choice to make but his decision would not be nearly as perilous as that of a defendant in a criminal case who must determine whether to testify and risk incriminating himself or to remain silent and risk conviction because the trier of fact has not heard his version of the case. In *McGautha* v. *California*, 402 U.S. 183, 213 (1971) (citation omitted), this Court recognized that:

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to fol-

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[20] In *Traub* v. *United States, supra*, 232 F.2d at 48, the court declined to follow *Lopiparo*, but it is unclear whether that declination related only to the contempt for Traub's refusal to testify or also extended to the holding that he could not be required to produce records if he testified he did not possess those records and claimed the privilege thereafter.

In *O'Henry's* the Second Circuit did not cite its own prior opinion in *Johnson*. The court purportedly distinguished *Presser* on the ground that *Presser* involved personal records while *O'Henry's* involved corporate records. We fail to see any rationale for that distinction. In either case, if the witness is unable to produce the demanded records, he must establish his inability to produce in order to avoid a court order directing compliance or a finding of contempt for his default.

> low whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved. * * *[21]

Requiring that election here does no violence to the policies behind the privilege against self-incrimination.

E. A blanket denial of one's ability to produce documents should not be accepted as competent evidence without the opportunity for cross-examination

The court of appeals held that respondent's written declaration that the documents were not in his possession or control was competent evidence to meet his burden of establishing his inability to comply, and that his Fifth Amendment claim could excuse any further questioning. If this holding is allowed to stand, it would enable an individual, whether in the context of a summons enforcement proceeding or a grand jury investigation, merely to make a blanket denial of his ability to comply with a court order and then withdraw from the fire of cross-examination before the reliability of his testimony has been tested. This is contrary to established principles.[22] See *Brown* v. *United States*, 356 U.S. 148, 155 (1958).

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[21] In *McGautha*, this Court, although questioning the validity of the earlier decision in *Simmons* v. *United States*, *supra*, indicated that *Simmons* was the only case in which the Court had held that an individual could be relieved of his choice between two constitutional claims (*i.e.*, determining whether to waive the privilege against self-incrimination under the Fifth Amendment in order to testify in support of a motion to suppress based on the Fourth Amendment).

Here, of course, the witness is not forced to choose between two constitutional rights; there is no constitutional right to be free of the compulsion of a subpoena to produce records.

Accordingly, in *United States* v. *Hankins*, *supra*, the Fifth Circuit held that if no opportunity for cross-examination were afforded, a statement by the contemnor that he could not comply with a summons was not credible evidence. There, as here, the summoned party did not assert lack of possession or the nonexistence of records as a defense in the summons enforcement proceeding. The assertion that the records could not be produced was raised only when Hankins was called upon to show cause why he should not be held in contempt for refusing to comply with an order enforcing a summons. He then offered to testify but only under the condition that he not be cross-examined. The district court rejected this proposal and found him in contempt. The Fifth Circuit affirmed, holding that Hankins had not met his burden of showing that he did not possess the summoned documents, and that the Fifth Amendment did not excuse him from the possibility of having to testify in order to meet his burden of proof.

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[22] The testimony of one who refuses to be cross-examined is subject to being stricken. *Brown* v. *United States*, *supra*, 356 U.S. at 156 n.5; *Klein* v. *Harris*, 667 F.2d 274, 289 (2d Cir. 1981). Since respondent presented nothing beyond his uncross-examined declaration, he failed to show cause why he should not be held in contempt. Thus, the respondent was left with only his own denials, which the court found incredible in context. *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 76; *United States* v. *Hankins*, *supra*. In accepting that declaration as evidence, the court of appeals has removed from the trier of fact the discretion to disbelieve a witness or party who appears before it.

Under the decision below, by contrast, the district court was required to accept respondent's declaration of nonpossession as wholly truthful. In no other situation, however, is the trier of fact compelled to give substantive weight to a naked, self-serving denial. To the contrary, ex parte declarations and affidavits are generally not accepted as credible evidence. *Walker* v. *Johnson*, 312 U.S. 275, 281 (1941); *Lindhorst* v. *United States*, 585 F.2d 361, 365 (8th Cir. 1978); *Presser* v. *United States*, *supra*, 284 F.2d at 235. Our adversary system of justice permits courts to reject self-serving declarations unless the credibility of the statements can be tested by cross-examination. And nothing in the privilege itself or in the decisions of this Court suggests that the Fifth Amendment requires a different rule.

F. If respondent's written declaration is admissible evidence, it should constitute a waiver of the Fifth Amendment privilege

The court of appeals overlooked the fact that respondent was not forced to submit a written statement in order to meet his burden. To the contrary, he could have attempted to meet his burden through evidence from other sources (see pages 26-27, *supra*). Indeed, the manner in which he could have met his burden, what evidence to produce, and the means by which it was elicited, were within his control, limited only by the Federal Rules of Evidence and Federal Rules of Civil Procedure.[23] He chose, however, to submit nothing more than his own statement. In that situation, the government's right to cross-examine him as to the contents of that statement is not precluded by the Fifth Amendment. *United States* v. *Hankins, supra.* Indeed, if the rule were otherwise, "by a selective reliance upon the Fifth Amendment * * * the * * * [witness] would be able to present a distorted factual picture by bringing [out] * * * only those facts favorable to [him] * * *." *United States* v. *Weber*, 437 F.2d 327, 334-335 (3d Cir. 1970), cert. denied, 402 U.S. 932 (1971); see also *Johnson* v. *United States*, 318 U.S. 189, 196 (1943); *Rogers* v. *United States*, 340 U.S. 367, 371, 373 (1951).

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[23] Respondent made every effort to stymie the production of other available evidence in this case. He did not appear and raise any substantive challenge to the summons itself when ordered to "show cause" why the summons should not be enforced, and he affirmatively blocked the vice-president of

This Court has repeatedly held that an individual who voluntarily testifies cannot thereafter claim the Fifth Amendment privilege to avoid cross-examination on matters that reasonably relate to the subject matter of his direct examination. *McGautha* v. *California, supra,* 402 U.S. at 215; *Brown* v. *United States, supra*; *Rogers* v. *United States*, 340 U.S. 367, 373 (1951); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316 (1900); *Brown* v. *Walker*, 161 U.S. 591, 597-598 (1896). The rationale supporting this principle relates to the very nature of our adversary system of justice, which requires full disclosure of all

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AIM and his own son from producing whatever corporate records they might have had (J.A. 84, 89). His conduct at every stage of these proceedings demonstrated an utter disregard for the summonses and the court's process by which enforcement was sought. This is not a case where respondent has sought to litigate the government's right to examine corporate records; this is a case where respondent has sought to escape the "minimal duties" of one subpoenaed by lawful authority by leading that authority on "a game of hare and hounds." *United States* v. *Bryan, supra,* 339 U.S. at 331.

the facts within the framework of the rules of evidence. *United States* v. *Nixon*, 418 U.S. 683, 709 (1974).

A witness's voluntary offer of testimony upon any fact operates as a waiver of the Fifth Amendment privilege as to matters reasonably related to the subject matter of the direct examination. *McGautha* v. *California*, *supra*, 402 U.S. at 215; *Brown* v. *United States*, *supra*, 356 U.S. at 154-156; *Johnson* v. *United States*, 318 U.S. 189, 195 (1943); *United States* v. *Beechum*, 582 F.2d 898, 907-910 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); *United States* v. *Hearst*, 563 F.2d 1331, 1340 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). Thus, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope of limits of the privilege against self-incrimination." *Brown* v. *United States*, *supra*, 356 U.S. at 156 (footnote omitted).

The potential for distortion of facts through selective invocation of the Fifth Amendment was well illustrated by Judge Learned Hand in *United States* v. *St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942), cert. dismissed, 319 U.S. 41 (1943):

> It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition. The time for a witness to protect himself is when the decision is first presented to him; he needs nothing more; and anything more puts a mischievous instrument at his disposal. * * *

In allowing respondent to submit the declaration and deprive the government of its right to cross-examination, the court of appeals misapplied the doctrine of waiver and permitted only a partial, incomplete search for the truth. Its holding is contrary to basic evidentiary principles, set forth by this Court in *Brown* v. *United States*, *supra*, 356 U.S. at 155-156:

> [W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only his choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. * * *

Thus, the court of appeals erred in concluding that respondent had not waived the privilege. It should have allowed the government to subject his testimony to "the acid test of adverse cross-examination," *United States* v. *Beechum*, *supra*, 582 F.2d at 907; see, *e.g.*, *United States* v. *Hearst*, *supra*. Otherwise, no testimonial significance should have been accorded to respondent's uncross-examined written statement.

In sum, the decision below erroneously allows respondent to have it both ways: his uncross-examined statement, coupled with his assertion of the privilege against self-incrimination, has been held to satisfy his burden of proof and to block further inquiry by the government. In effect, respondent has been allowed to stymie the government's investigation with impunity despite his failure to meet the burden imposed upon him by decisions of this Court. Since respondent failed to prove a defense or to purge himself of contempt, the court of appeals erred in reversing the district court's judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA AND
JOAN M. VANDENBERG, SPECIAL AGENT,
Petitioners

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC. AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

**On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

BRIEF FOR RESPONDENT

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**On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On August 10, 1979, the United States (hereinafter "government") petitioned the United States District Court for the Eastern District of California to enforce two Internal Revenue Service (IRS) summonses originally issued on January 22, 1979. These summonses directed respondent, RICHARD W. RYLANDER, SR., to appear, testify and produce certain corporate books and records of two corporations of which respondent was allegedly the president. The Honorable Lawrence K. Karlton, District Judge, issued an Order to Show Cause directing respondent to appear on January 14, 1980 and show cause why the summonses should not be enforced.

At the show cause hearing, the government proceeded by way of an offer of proof (J.A. 46) to establish that respondent was president of the subject corporations. (Tr. 5-11). Respondent did not appear at the hearing, (J.A. 51) but instead returned the order to the court together with a letter explaining that he was not the president of the entities. (J.A. 20). The court enforced the summonses, ordering respondent to appear before an IRS agent on February 4, 1980 and produce the requested records.

In compliance with the court's order, respondent appeared before the IRS agents. Agent VanDenBerg explained that she was conducting a criminal investigation of respondent's tax liability,[1] and advised respondent of his Fifth Amendment rights (J.A. 99). Respondent thereupon stated for the record that he had none of the demanded records and therefore, could not produce them. (J.A. 100, 102). He further stated that he was not waiving any of his rights, (J.A. 99), and declined to answer further questions regarding the records. (J.A. 101).

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[1] A considerable amount of evidence has recently become available to respondent indicating that the IRS had launched a criminal investigation of respondent's tax liability long before these subpoenas were issued. The subpoenas were issued merely as a pretense to gather evidence for a criminal investigation. In a proceeding in the United States District Court for the Northern District of California (C 79-682 WAI) on May 18, 1979, Agent VanDenBerg admitted that she was conducting a criminal investigation of respondent (Tr. 30-31, 35), and the Assistant United States Attorney so stipulated (Tr. 49).

At the contempt hearing in this case, Agent Ogihara admitted that VanDenBerg was conducting a criminal investigation of respondent and that he was assisting her. (Tr. 189: 10-15). Thus, it is possible that the summonses could have been quashed at the enforcement hearing because they were issued solely to obtain evidence for a criminal prosecution. *United States* v. *Schutterle*, 586 F.2d 1201, 1203 (8th Cir. 1978); *United States* v. *Moriarity*, 435 F.2d 347, 349-50 (7th Cir. 1970); *United States* v. *Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969).

Despite Mr. Rylander's denial of possessing the records, the IRS petitioned for enforcement of the court's order, and the court issue an order to show cause why respondent should not be held in contempt.[2] A court trial on the contempt charge was held on October 8, 1980.[3] Respondent's request for a jury trial was denied. (J.A. 38-39). Rylander was not represented by counsel at the trial. The government's case paralleled its offer of proof at the hearing to enforce the summons. This evidence essentially established that the two corporations had not been officially dissolved,[4] and that respondent's name appeared on corporate tax returns and bank accounts. The government argued that respondent must, therefore, be in possession of any corporate records. However, there was no evidence introduced to establish that the records sought by the subpoenas actually existed or that respondent, in fact, had any form of custody or control over the records.

On these limited facts, the trial court found that, by the weight of the evidence (Tr. 260-61), respondent was in contempt for failure to produce the documents. The court ordered that respondent could purge himself of the contempt by either complying with the court's order to produce, or testifying as to why he could not produce the documents. (Tr. 262-63). Respondent offered to testify, but the government indicated its intention to cross-examine him. Because respondent's Fifth Amendment rights might be affected by the cross-examination, the court continued the matter until counsel could be appointed to advise Rylander.

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[2] Respondent was also charged with criminal contempt for avoiding service, failure to comply with the order to produce, and failure to appear at a show cause hearing. Only the latter two charges resulted in convictions. Respondent's appeal is still pending before the Ninth Circuit.

[3] Respondent's arguments that the civil and criminal contempt trials were improperly combined, and that he was denied his right to a trial by jury were rejected by the Ninth Circuit. See 656 F.2d 1313, 1316 n.2.

[4] However, both corporations were listed as "inactive" by the Secretary of State. (J.A. 65, 72).

The following morning, without seeking the approval of counsel, respondent filed a sworn "Oath in Purgation of Contempt" stating that he did not have any of the documents requested by the IRS summons. (J.A. 91-92). Present counsel was appointed that afternoon to advise respondent. The court continued the matter to October 23, 1980, to permit counsel time to prepare. Additionally, the court indicated that there was not yet a judgment of civil contempt because the requisite findings of fact and conclusions of law had not been filed. (Tr. 289, 291).[5]

On October 23, 1980, respondent took the witness stand and testified on direct examination that he did not have the records. (Tr. 323). He asserted his privilege against self-incrimination when questioned as to their whereabouts. (id.).[6] Defense counsel then objected to the findings and conclusions (Tr. 308-10), and argued that the purging conditions violated respondent's Fifth Amendment right (Tr. 354). Nevertheless, the court entered judgment of civil contempt and imposed the same purging conditions. (Tr. 361-62).

The Ninth Circuit reversed respondent's conviction on appeal. Initially, the court ruled that the findings in the summons enforcement hearing did not have the effect of res judicata so as to prohibit respondent from raising the defense of inability to comply at the contempt trial. The court found that the issue of Rylander's ability to comply had not actually been litigated in the prior hearing. 656 F.2d at 1318.

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[5] Accordingly, petitioners' contention that respondent did not timely raise the defense of inability to comply (BP n.15) is untenable. Respondent had tendered the defense by his written statement and by oral testimony before judgment was pronounced.

[6] The Assistant United States Attorney admitted on the record that respondent's mere act of filing the "Oath in Purgation" did not operate to waive his Fifth Amendment rights. (Tr. 354). Therefore, this Court should rule that the government has waived that argument.

After this preliminary finding on res judicata, the appellate court went on to examine the procedures and requirements of a contempt proceeding. The court noted that inability to comply is a defense for which the burden of production rests on the defendant. *Id.* The ultimate burden of persuading the court that the defendant has the actual ability to comply remains with the government. *Id.*

In possible conflict with the defendant's burden is his Fifth Amendment right against self-incrimination. If there is a bona fide assertion of a Fifth Amendment claim, the right may be violated by requiring the defendant to produce categorical and detailed evidence of his inability to comply. *Id* at 1319. The defendant could be placed in the dilemma of incarceration for contempt or self-incrimination. *Id.*

Therefore, the subject of a subpoena requiring production of documents must either comply or state under oath that he does not have possession or control of them. *Id.* This statement, coupled with a valid Fifth Amendment claim, operates to satisfy the defendant's burden of production and shifts the burden of showing that the documents actually exist in his custody or control to the government. *Id.* The appellate court held that the government's inferential sequence of proof failed to satisfy its burden in this case. *Id* at 1319-20. Accordingly, the Ninth Circuit remanded the case for additional findings on the validity of Rylander's Fifth Amendment claim. *Id.* The court also ordered that the government be given an additional opportunity to satisfy its burden of proof. *Id.*

SUMMARY OF ARGUMENT

Respondent contends that the decision of the Ninth Circuit should be affirmed on the following grounds:

1. Inasmuch as the issue of respondent's ability to comply was neither raised nor litigated at the summons enforcement proceeding, respondent is not estopped to raise the issue in the contempt proceeding. Due to the lack of any litigation on the merits or a finding of ability to comply, no presumption of continuing possession has arisen.

2. Respondent met his burden of producing evidence of his inability to comply and the burden then shifted to petitioner to prove otherwise. Respondent properly asserted his Fifth Amendment right when questioned further on the whereabouts of the records. The decisions of this Court and other courts support respondent's position.

3. Respondent's statement that he does not possess the records is competent evidence because it is required of a putative custodian to state under oath that he either can or cannot produce the records.

4. There was no waiver of respondent's privilege against self-incrimination because his statement that he was unable to comply was legally required of him and therefore he did not voluntarily waive his constitutional right.

ARGUMENT

1. THE DISTRICT COURT'S ENFORCEMENT ORDER WAS NOT RES JUDICATA AS TO THE ISSUE OF ABILITY TO COMPLY, AND NO PRESUMPTION OF CONTINUING POSSESSION ARISES THEREFROM

Petitioners argue that the district court's order enforcing the summonses and directing respondent to comply operates as res judicata on the issue of respondent's ability to comply at the time of the order. It is further argued that the finding inherent in the order (that respondent had the ability to comply) created a presumption that he continued to possess the records, and that this presumption saddled respondent with the burden of proving his inability to comply at the time of the contempt hearing. Respondent disputes both of these contentions.

The district court's order enforcing the summonses does not have the effect of res judicata because there was no litigation on the merits in the summons enforcement proceeding of respondent's ability to comply with the order. At a summons enforcement hearing, the IRS's burden is light: it must only show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). It is unnecessary for the IRS to demonstrate that the information sought is in the possession of the individual summoned. *United States* v. *Freedom Church*, 613 F.2d 316, 322 (1st Cir. 1979).

In this case, the IRS proceeded according to the minimum requirements of *Powell*. Respondent did not appear at the hearing and tendered no issues. The government then proceeded by way of an offer of proof limited simply to a satisfaction of the *Powell* conditions and whether respondent was the president of the subject corporations. Whether respondent had possession and control of the records was never in issue, never litigated before the court, and no finding was made regarding his ability to comply.[7]

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[7] Petitioners cite *Clickenbeard* v. *Central Southwest Oil Corp.*, 562 F.2d 649, 651 (5th Cir. 1976) for the proposition that "implicit in such enforcement orders is a determination that respondent did, in fact, have the records sought." (BP p.20). A thorough review of page 651 of the *Clickenbeard* decision reveals absolutely no authority that even remotely supports this contention. Thus, the fact remains indisputable that no findings were made at the enforcement hearing that respondent possessed the records sought.

The Ninth Circuit's decision does not conflict with established law regarding the estoppel effect of an enforcement order. While petitioners allege that the opinion of the Court of Appeals conflicts with the decisions in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948); *United States* v. *Peter*, 479 F.2d 147 (6th Cir. 1973); *United States* v. *Secor*, 476 F.2d 766 (2d Cir. 1973), a close examination of those cases reveals significant distinctions with the facts herein and actually indicates uniformity of decisional law.

Significantly, in each of the allegedly conflicting cases cited by petitioner, the alleged contemnor had actually litigated his defense to the contempt charge in the prior enforcement hearing. *See Maggio* v. *Zeitz*, supra, 333 U.S. at 59, 71; *United States* v. *Peter*, *supra*, 479 F.2d at 150; *United States* v. *Secor*, *supra*, 476 F.2d at 767. Undoubtedly, these prior findings precluded later challenges at the contempt hearing based on the same grounds. Respondent herein has never challenged the validity of this legal concept and the appellate opinion below specifically distinguished these cases because respondent's defense was not actually litigated at the prior proceeding. *See* 656 F.2d at 1318 n.6.

Furthermore, the *Peter* and *Secor* decisions are distinguishable in that the defenses raised at each proceeding challenged the validity of the summons not the ability of the subject to comply. Both *Peter* and *Secor* claimed that the order to turn over records violated their Fifth Amendment privileges. *See* 479 F.2d at 149; 476 F.2d at 767. In contrast, Rylander has not claimed that the order to produce violates his right against self-incrimination. Rather, he claims that he is unable to comply with the court's order, and that any attempt to compel testimony from him as to the whereabouts of the records would violate his Fifth Amendment rights.

A defense that challenges the validity of the summons, as in *Peter* and *Secor*, is a defense that can be raised once and only once. This is not true for the defense of inability to comply. As this Court explained in *Maggio* v. *Zeitz*, civil contempt is designed as a remedy to compel compliance with the court's order. 333 U.S. at 68. The principle would be violated and the remedy useless if the subject is unable to comply with the order. *Id* at 72. Therefore, this Court concluded that, regardless of the adjudication in the enforcement hearing, the defense of inability to comply can again be raised at the contempt hearing:

> We agree with the Court of Appeals that the turnover order may not be attacked in the contempt proceedings because it is res judicata on this *issue of possession at the time as of which it speaks* . . . [The alleged contemnor] cannot challenge the previous *adjudication* of possession, but that does not prevent him from *establishing lack of present possession*. *Id* at 75. (Emphasis added)[8]

The term "res judicata" encompasses two distinct concepts: merger or bar (claim preclusion) and collateral estoppel (issue preclusion). James & Hazard, "Civil Procedure," 532 (2d ed. 1977). This Court, speaking through Justice Field distinguished the two concepts in *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352-53 (1877):

> In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to

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[8] Both the *Maggio* and *Secor* courts refer to a prior "adjudication." The term "adjudication" is defined as:

> The formal giving or pronouncing a judgment or decree in a cause; also the judgment given. The entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved. The equivalent of a "determination." *And contemplates that the claims of all the parties thereto have been considered and set at rest.*
>
> Black, "Black's Law Dictionary" p. 39 (5th ed. 1979). (emphasis added).

> sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Neither of these two concepts can be invoked by petitioners to preclude respondent from raising the issue of inability to comply at the contempt hearing. Claim preclusion is inapplicable because the two causes of action must be the same, *see Hooker* v. *Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978), and actions for contempt and enforcement of an IRS summons are different. A contempt hearing is centered around disobedience of the court's process, whereas a summons enforcement proceeding is limited essentially to a determination of the propriety of the investigation. *See United States* v. *Powell*, supra, 379 U.S. at 57-58.

Issue preclusion is also inapplicable because the issue of inability to comply was not actually litigated on the merits in the prior proceeding. "Whereas res judicata [claim preclusion] forecloses all that which might have been litigated previously collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit." *Brown* v. *Felsen*, 442 U.S. 127, 139 n.10 (1979).

Because there was no litigation or finding of possession in the enforcement proceeding, no presumption of continuing possession arises therefrom. It is not the order enforcing the summons that creates the presumption of possession, as petitioners argue, but it is the *finding* of possession made at the prior hearing that gives rise to the presumption. *See Maggio* v. *Zietz, supra,* 333 U.S. at 65-66; *Sigety* v. *Abrams*, 632 F.2d 969, 974-75 (2d Cir. 1980). Since respondent's alleged possession of the subpoenaed records was never litigated at the enforcement hearing and no finding was made, the District Court was not entitled to presume that respondent had possession of the records at the contempt hearing.

2. AN ALLEGED CONTEMNOR HAS THE BURDEN OF PRODUCING EVIDENCE OF INABILITY TO COMPLY; THE ULTIMATE BURDEN OF PROOF REMAINS WITH THE GOVERNMENT

The Ninth Circuit held that the defendant in a civil contempt proceeding bears the burden of producing evidence of his inability to comply. The government bears the ultimate burden of proof on the issue. This holding fairly and reasonably accommodates the interests of the parties involved, and is supported by the decisions of this Court and other courts.

A custodian of corporate records cannot object to a valid summons for their production based on a personal Fifth Amendment claim. *United States* v. *White*, 322 U.S. 694, 701 (1944); *Wilson* v. *United States*, 221 U.S. 361, 385 (1911). The custodian's duties extend to a requirement that he give sworn testimony that he does not possess the records when he fails to produce them in response to a valid summons. *United States* v. *O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979). Even though the custodian cannot assert a Fifth Amendment objection to production of the documents, he does retain his privilege against self-incrimination when questioned as to the whereabouts of the records. *Curcio* v. *United States*, 354 U.S. 118, 123-24 (1957).

Therefore, if the custodian is required to present detailed evidence of his inability to comply at the contempt hearing, he may be effectively forced to testify in violation of his privilege against self-incrimination. The Fifth Amendment was designed to prevent the defendant from being placed in "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964).

Once the defendant has made a bonafide Fifth Amendment claim, if he is required to give detailed testimony regarding his inability to comply, he will be compelled to waive his constitutional right. No government interest can justify compelled self-incrimination. *See New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). Placing the defendant in such a position is also grossly unfair, because often he will be the only witness capable of supporting his contention. A logical solution to this problem is to shift the burden of proof and/or production.[9]

In *United States* v. *Fleischman*, 339 U.S. 349 (1950), this Court recognized that the government must make some showing that the subpoenaed records exist and can be produced by the defendant once he has claimed inability to comply. Fleischman was charged with criminal contempt for failure to produce records in response to a Congressional subpoena. The key issue on appeal was whether the willfulness element of the offense had been proven in the face of her denials of ability to comply. The Court noted that there was evidence that the records existed in the control of the defendant. 339 U.S. at 356.

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[9] One serious problem arises where a contemnor undertakes to prove his inability to comply with the decree. Since in most instances he has the burden of proof, it is quite possible that he will fail to establish inability to comply to the court's satisfaction. His own testimony may be all he can readily adduce; it is difficult to get corroboration of one's inability to obtain money. Thus, the contemnor may be placed in jail on an indefinite, coercive sentence, even though there is no way he can comply with the decree. In this respect, the situation resembles most other dispute-of-fact situations-there is always a risk that the trier of fact will misjudge the truth. But in the coercive contempt situation, that misjudgment can result in a literally interminable jail sentence. It may very well be that a legislative adjustment is needed to remedy this situation. Several alternatives might be considered: shifting the burden of proof (or persuasion) once the inability-to-comply issue is raised by the defense; or putting the burden on the moving party in the first instance.

Dobbs, "Contempt of Court" A Survey, 46 Cornell L. Rev. 183, 266-67 (1971).

In light of the circumstances, the *Fleischman* court held that "the burden was upon [the defendant] to present evidence to sustain" her defense. *Id.* at 364. The Court upheld her conviction because due to her lack of evidence, the government's case was strong enough to convict her. *Id.* The logical inference to be drawn from the language of the opinion is that had Fleischman produced evidence of her inability to comply, then the government would have been required to rebut the showing, because it had the burden of proof.[10]

Other courts have recognized that a contempt conviction will not stand when the defendant professes inability to comply and no contrary showing has been made by the government. *United States* v. *Hansen Niederhauser Co.*, 522 U.S. 1037, 1040 (10th Cir. 1975); *see Traub* v. *United States*, 232 F.2d 43, 47 (D.C. Cir. 1955). It is simply a logical means of respecting the defendant's constitutional rights to require the government to produce some evidence that the records exist and are in his control before requiring him to give up his privilege against self-incrimination by testifying as to their whereabouts.

The Ninth Circuit's decision in this case operates to accommodate the competing interests at stake. On one hand, the putative custodian must either produce the records or state for the record that he cannot produce them, because his constitutional privilege will not protect him from being so required. *See O'Henry's supra*, 598 F.2d at 318. On the other hand, the defendant's Fifth Amendment right is protected by requiring the government to show that the records exist in his control before compelling him to waive its protection via self-incriminatory testimony.

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[10] The circumstances justifying the requirement that the government make some showing of ability to comply are stronger in this case than in *Fleischman*. Fleischman need only have testified regarding her good faith attempts to comply with the production order to refute the willfulness element of the contempt charge. In contrast, any testimony given by respondent may directly incriminate him if he is required to demonstrate why he cannot produce the records.

This Court's decision in *McPhaul* v. *United States*, 364 U.S. 372 (1960) indicates that the putative custodian must respond to the subpoena by either producing the records or stating his inability to do so. While no court will convict someone for failure to produce documents he does not possess, *United States* v. *Bryan*, 339 U.S. 323, 330 (1950), he must at least state his inability to comply for the record to tender the issue to the trier of fact. 364 U.S. at 379.

Yet, the putative custodian cannot "be compelled to convict himself out of his own mouth." *Curcio* v. *United States*, *supra*, 354 U.S. at 128. He will be forced into this very position if he is required to go beyond stating his inability to comply and testify as to the whereabouts of the records. *See id.*[11] If defendant's contempt conviction is allowed to stand, it will be based solely on his good faith assertion of his constitutional rights as outlined by this Court in *Curcio*. The conviction will not be substantiated by any proof offered by the government.

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[11] Again, petitioners analogize the defendant's dilemma to that faced in *McGautha* v. *California*, 402 U.S. 183 (1971). The analogy is misplaced. Defendant Crampton was faced with the choice in a single phase murder trial of remaining silent and incurring a severe penalty, or testifying as to mitigating factors but possibly incriminating himself on the merits. Unlike Rylander, Cramption was not faced with the certainty of contempt or self-incrimination, whereby a waiver of his Fifth Amendment privilege would be compelled. Rather, he faced the purely voluntary, tactical choice of deciding whether it was more valuable to testify or remain silent. In his majority opinion, Justice Harlan expressly distinguished "the cruel trilemma of self-accusation, perjury, or contempt." *Id.* at 215 (citations omitted).

3. RESPONDENT'S WRITTEN STATEMENT OF HIS INABILITY TO COMPLY IS COMPETENT EVIDENCE

Petitioners argue that respondent's written statement of his inability to comply is not competent evidence because he was not subject to cross-examination. The argument is erroneous because any cross-examination regarding his inability to comply would have been properly covered by the Fifth Amendment privilege, while his statement was compelled testimony auxiliary to nonproduction. *See O'Henry's, supra*, 598 F.2d at 318. His statement must be accepted as accurate in view of the government's failure to introduce any evidence to the contrary. *See Traub* v. *United States, supra*, 232 F.2d at 47.

The Fifth Circuit's decision in *United States* v. *Hankins*, 565 F.2d 1344 (5th Cir. 1978), opinion clarified and rehearing denied, 581 F.2d 431 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979) is cited in support of petitioner's contention. However, Hankins had attempted to go considerably beyond the required testimony auxiliary to nonproduction. Instead, he offered to rebut strong government testimony at his contempt hearing that he possessed the subpoenaed records on the condition that he not be cross-examined. The evidence indicated that an accountant's report, known to exist, and specific pages from the company books had not been produced. 565 F.2d at 1351. Thus, Hankins would have had to go considerably beyond the required production of the records or statement that he cannot comply. His request not to be cross-examined was properly denied.

In contrast, respondent's written affidavit filed on October 9, 1980, merely states his inability to comply. He did not go beyond the required testimony and thereby waive his privilege against self-incrimination. *See, e.g., Presser* v. *United States*, 284 F.2d 233, 235 (D.C. Cir. 1960). As this Court stated in *Curcio*, questions regarding the whereabouts of the records are more than auxiliary to their production. 354 U.S. at 125. Accordingly, any cross-examination is still privileged.

4. RESPONDENT'S DECLARATION DOES NOT CONSTITUTE A WAIVER OF THE FIFTH AMENDMENT PRIVILEGE

Finally, petitioners argued that respondent's act of filing his written declaration constituted a waiver of his Fifth Amendment privilege. This argument is wholly frivolous because the law compels respondent to give sworn testimony in response to the subpoena that he cannot produce the records. Because of this compulsion, the statement is involuntary,[12] and does not amount to a waiver of the Fifth Amendment privilege.

It is axiomatic that, to constitute a waiver of the privilege against self-incrimination, the statement must be given voluntarily. *See Brown* v. *United States*, 356 U.S. 153, 155 (1958). As the court in *United States* v. *O'Henry's Film Works, supra*, held, such statements as respondent's are compulsory and do not constitute a waiver of the privilege:

> A plain reading of *Curcio* and *McPhaul* leads to the conclusion that the duty of the putative custodian of an organization's records extends beyond mere production or nonproduction: when the agent fails to produce documents that are the subject of a valid summons or subpoena, if called before a court, he must given sworn testimony that he does not possess them. *The agent's statement that he does not possess the records at issue is merely part of his duty to comply with a lawful demand for them.* It might be called "testimony auxiliary to his nonproduction," by analogy to Judge Leonard Hand's holding that an agent must

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[12] Petitioners contend that the statement was voluntary because respondent voluntarily chose to testify instead of relying on the testimony of third parties. The Court of Appeals correctly rejected this argument as "speculative" 656 F.2d at 1319, and other similar arguments have also been rejected. *See United States* v. *Hankins, supra*, 565 F.2d at 1350. Moreover, the testimony offered by respondent in this case was not given by choice but was legally required "testimony auxiliary to his nonproduction." *O'Henry's, supra*, 598 F.2d at 318.

> identify the documents he does produce because "testimony auxiliary to the production is as unprivileged as are the documents themselves." *United States* v. *Austin-Bagley Corp.*, 31 F.2d 229, 234 (2d Cir. 1929). Just as an agent's identification of documents he has produced "merely makes explicit what is implicit in the production itself," *Curcio, supra*, 354 U.S. at 125, 77 S.Ct. at 1150, so does an agent's statement that he does not possess documents he has failed to produce make explicit what is implicit in the nonproduction. *Because the agent's testimony is unprivileged, it is not a waiver of his privilege against self-incrimination as to other matters.* 598 F.2d at 318. (emphasis added).

The holding of O'Henry's *supra* is directly supported by this Court's decision in *McPhaul* v. *United States*, 364 U.S. 372 (1960) wherein an alleged contemnor attempted to excuse his failure to make any explanation for nonproduction of subpoenaed documents by arguing that any such explanatory statement would have constituted a waiver of his Fifth Amendment rights. Citing *Curcio*, this Court held that there was "no merit" in the contention. *Id.* at 380.

Not only must the waiver of a constitutional right be voluntary, it must also be knowingly and intelligently done with full awareness of the consequences. *See e.g., Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Waivers are strictly construed. *See Smith* v. *United States*, 337 U.S. 137, 150 & n.11 (1949).

Respondent filed his sworn statement denying possession of the subpoenaed documents on October 9, 1980. At that time the decisions in *McPhaul* and *O'Henry's* were the applicable law on his predicment (as they are today). As cited *supra*, these cases specified in clear, unequivocal language that respondent's statement denying possession of the records was not privileged. Respondent can hardly be considered as waiving his privilege against self-incrimination in view of this state of the law. There was absolutely no case law or other legal principle to put him on notice that his sworn statement would amount to a waiver of the privilege. Therefore, even if this Court holds that such a statement does amount to a waiver, respondent's statement was not made under the knowing, intelligent, and voluntary circumstances required to constitute a waiver.

CONCLUSION

Petitioners' brief is replete with suggestions that respondent is a "tax evader" who must be stopped so that the IRS's effort to collect taxes is not irreparably damaged. This is not the issue before the Court. Rather, this Court is asked to decide what procedural safeguards should be imposed when the IRS seeks to utilize the process of the courts to obtain sanctions for noncompliance with an IRS summons.

The safeguards that this Court decides to impose should fairly and reasonably accommodate the interests of all parties involved. It is both fair and reasonable to require that the government produce some evidence that the records it seeks are in existence before compelling respondent to be held in contempt and give up his constitutional right against self-incrimination.

The decision of the Ninth Circuit fairly and reasonably accommodates the competing interests involved. It should be affirmed.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-1120

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA AND
JOAN M. VAN DEN BERG, SPECIAL AGENT, PETITIONERS

v.

RICHARD W. RYLANDER, SR., AS PRESIDENT OF
RYLANDER & CO. REALTORS, INC. AND
AFFILIATED INVESTMENTS AND MORTGAGE COMPANY

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief we explained why the court of appeals' decision erroneously permits respondent to avoid civil contempt. The court has, in effect, rewarded respondent for his contumacious conduct by: (1) failing to give conclusive effect to the enforcement order, entered after a hearing respondent chose not to attend; (2) elevating respondent's self-serving "Oath in Purgation" to the status of competent evidence; (3) permitting respondent to use the privilege against self-incrimination as a sword to prevent cross-examination on a subject respondent himself put in issue; and (4) concluding that respondent's uncross-examined statement, coupled with his assertion of the privilege, must be accepted as satisfying his burden of proving facts that are peculiarly within his knowledge.[1]

Respondent fails to offer any persuasive support for the court of appeals' abrupt departure from established law. His contentions, however, invite the following response.[2]

1. Respondent assumes that his testimony was in fact compelled and proceeds to fashion his arguments from that starting point. He states that he could comply with the court's order only by producing the documents or by testifying as to why he could not produce them (Resp. Br. 3-4). This, however, is not accurate. While the district court

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[1] In our opening brief, we noted (Pet. Br. 3 n.1) that subsequent to the filing of our petition for a writ of certiorari, respondent was indicted for willfully failing to file income tax returns for the years 1975 through 1977, in violation of 26 U.S.C. 7203. On July 15, 1982, respondent was convicted and sentenced to six months' imprisonment on each count, the terms to run consecutively. In addition, he is to pay the cost of prosecution. That conviction has no bearing on this case since the information respondent was summoned to produce is still necessary to determine his correct tax liabilities for those and other years.

[2] Respondent's contention (Resp. Br. 2) that the summonses were issued for an improper purpose is not only unfounded (see Pet. Br. 3 n.1) but cannot be raised in the contempt proceeding as a basis for avoiding compliance with the enforcement order. Questions regarding the purpose of the investigation should have been raised in the enforcement proceeding. *United States* v. *First State Bank*, 691 F. 2d 332, 334-335 (7th Cir. 1982). In view of his failure to raise this issue then, he is precluded by *res judicata* from raising it at this time. See *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948); *Brown* v. *Felsen*, 442 U.S. 127, 139 n.10 (1979).

Respondent's reference (Resp. Br. 2 n.1) to statements made in an earlier summons case (*United States* v. *Wells Fargo Bank*, N.D. Cal. No. C-79-682 WAI, May 18, 1979), is out of place here. Nothing in that case is included in the record here. Furthermore, the statements referred to from that case were essentially the same as those made by the agent in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), which the Court found to be insufficient to establish a sole criminal purpose.

recognized that respondent could comply with the court order by producing the documents or by demonstrating that he was incapable of doing so (J.A. 57-58), it did not require respondent himself to testify to demonstrate his inability to produce the documents. It was clearly open to him to produce the testimony of other persons to establish his inability to produce the records.

2. Here, however, respondent chose not to contest his ability to comply in the summons enforcement proceedings. Only after the government obtained the enforcement order and only after respondent had been arrested and had been held in contempt did he present to the court any form of response—his "Oath in Purgation of Contempt" (J.A. 91-92). In that document, he flatly asserted his lack of possession or control of the summoned documents. His self-serving statements were plainly designed to insulate respondent from the consequences of his contempt and also to convey the impression that the records no longer existed. The face of the declaration demonstrates that respondent knew he was making a statement that was the proper subject of a Fifth Amendment privilege claim, and that he voluntarily made the limited self-serving disclosures in an attempt to avoid the imposition of contempt sanctions and, at the same time, preclude further inquiry by the government.[3] The district court thus correctly refused to credit that self-serving declaration. The court of appeals' decision, however, requires such statements to be accepted as credible—indeed, conclusive—evidence without cross-examination. This, we submit, would permit the recipient of a summons

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[3] The "Oath in Purgation" was filed after the government announced its intention to cross-examine respondent should he choose to present his own evidence and after the court, alerted to possible Fifth Amendment issues, proposed to appoint counsel to advise respondent (J.A. 58-60).

or subpoena to transform whatever half-truths and distorted factual assertions he wishes to present into dispositive evidentiary facts.[4] The Fifth Amendment does not require such a result and the interests it is designed to protect are not advanced by permitting it to be used to present only those facts the respondent chooses to offer while shielding from the trier of fact those facts unfavorable to him.[5]

There is no constitutional impediment to presenting respondent with the decision whether to offer his own testimony or to remain silent. *McGautha* v. *California*, 402 U.S. 183, 213 (1971). And, once he decides to testify, the Fifth Amendment poses no bar to cross-examination. As this Court observed in *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980):

> A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to

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[4] In this regard, respondent is simply mistaken (Resp. Br. 16-18) in arguing that if his statement of nonpossession was voluntary it nevertheless did not constitute a waiver of the privilege because respondent lacked the requisite knowledge of the consequences to constitute a waiver. The point, however, is that the statement was voluntarily made, not the product of coercion, and thus it must be subject to cross-examination if it is to be accepted as credible evidence. *Brown* v. *United States*, 356 U.S. 148 (1958). See also *United States* v. *Hearst*, 563 F. 2d 1331, 1339 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978) (holding that a witness' subjective determination that he is being coerced is insufficient to render otherwise voluntary testimony involuntary).

[5] Respondent's assertion (Resp. Br. 4 n.6) that the Assistant United States Attorney "admitted" the filing of the "Oath of Purgation" did not operate as a waiver, is not an accurate representation of what occurred at the hearing. While the government's attorney did agree that the mere filing of the document did not act as a waiver, he made it quite clear that if respondent would not submit to cross-examination on the document, then that document "should be stricken" (Tr. 356).

testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown* v. *United States*, 356 U.S. 148, 156 (1958).

3. While the privilege, when properly invoked, protects a witness from being compelled to give potentially incriminating evidence, it does not follow that offensive use of the privilege may confer additional tactical benefits. But here, the court of appeals held that the privilege, plus the uncross-examined statement, not only precluded inquiry by the government but also satisfied respondent's burden of proof. This conclusion effectively undermines the authority of the district court to decide, in light of all the circumstances, that respondent's uncross-examined statement is simply not credible. Thus, even if the "Oath in Purgation" is deemed to be evidence and cross-examination precluded, there is no basis for requiring the trial court to accept that statement as true, thereby rewarding respondent with immunity from contempt. Cf. *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-320 (1976). Having elected to proceed in this manner, respondent should still be subject to the same risks any party faces—that his submission may not satisfy the finder of fact. Contrary to the holding of the decision below, assertion of the privilege neither establishes a defense nor satisfies respondent's burden of proof.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

Docket Sheet

NO. 81-1120-CFX SEE: 81-1063	TITLE United States, et al., Petitioners v. Richard W. Rylander, Sr., as President of Rylander & Co. Realtors, Inc., et al.
DOCKETED Dec. 15, 1981	COURT United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Solicitor General
	Counsel for Respondents: Joseph F. Harbison, III,
Nov. 19, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until December 18, 1981 by Rehnquist, J, November 23, 1981.
Dec. 15, 1981	Petition for writ of certiorari filed. (RECORD FILED).
Jan. 27, 1982	DISTRIBUTED. 2-19.
Feb. 8, 1982	Response requested.
Mar. 16, 1982	Order extending time for respondent Richard W. Rylander to file a response to the petition until Mar. 30, 1982.
Mar. 26, 1982	Motion of respondent Richard W. Rylander, Sr., for leave to proceed in forma pauperis, and brief in opposition filed.
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 9, 1982	Reply memorandum for the U. S. filed. (D).
Apr. 20, 1982	REDISTRIBUTED. 4-23.
Apr. 26, 1982	The motion of respondent Richard W. Rylander, Sr. for leave to proceed in forma paueris is GRANTED. Petition GRANTED.

May 10, 1982	Motion of respondents for appointment of counsel filed.
May 12, 1982	DISTRIBUTED. 5-27. (Above motion).
June 1, 1982	The motion for appointment of counsel is granted and it is ordered that Joseph F. Harbison, III, Esquire, of Sacramento, California, is appointed to serve as counsel for respondent Richard W. Rylander, Sr. in this case.
June 10, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until July 12, 1982.
July 12, 1982	Joint appendix filed.
July 12, 1982	Brief for the petitioners filed.
July 23, 1982	Order extending time to file the respondents' brief on the merits until Sept. 10, 1982.
Sept. 14, 1982	Motion of respondents for leave to argue points not raised by petitioners filed.
Sept. 15, 1982	DISTRIBUTED. Oct. 8, 1982 (Above motion).
Sept. 29, 1982	STRICKEN (Above motion).

(Over)

81-1120

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 6, 1982	Response requested to motion of respondents for leave to argue points not raised by petitioners.
Oct. 12, 1982	DISTRIBUTED. 10-15. (Motion of respondents for leave to argue points not raised by petitioners).
Oct. 13, 1982	Opposition to motion of respondents for leave to argue points not raised by petitioners filed.
Oct. 18, 1982	The motion of respondents for leave to argue points not raised by petitioners is denied.
Oct. 28, 1982	Brief for the respondent filed.
Nov. 17, 1982	CIRCULATED.
Jan. 6, 1983	Reply brief for the petitioners filed. (D).
Jan. 18, 1983	ARGUED.